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No: _____

In The
Supreme Court of The United States

In the Interest of A.B., A Child.

Norean Hoots, L.S.W., of Cass County Social Services, and Monty Mertz, Guardian ad Litem, on behalf of A.B.,
Petitioners,

v.

K.B., F.B., and Turtle Mountain Band of Chippewa,
Respondents.

On Petition For Writ of Certiorari
To The Supreme Court of The State of North Dakota

PETITION FOR WRIT OF CERTIORARI

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JOINDER STATEMENT

Monty Mertz, Guardian ad Litem, on behalf of A.B., joins in the petition of Norean Hoots, L.S.W., of Cass County Social Services, pursuant to Rule 12.4 of the Rules of the Supreme Court of the United States.

Dated this 12th day of November, 2003.

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QUESTIONS PRESENTED FOR REVIEW

Introduction: This termination of parental rights case is before the Court on a threshold issue regarding jurisdiction and the appropriate review and application of the Indian Child Welfare Act (hereinafter ICWA). The matter is an appeal by Norean Hoots, L.S.W., of Cass County Social Services (hereinafter CCSS), of the North Dakota Supreme Court's decision of June 17, 2002, (petition for rehearing denied August 20, 2003) affirming the Juvenile Court's granting of Turtle Mountain Band of Chippewa's (hereinafter Tribe) motion to transfer jurisdiction from the state court to Tribal Court and motion to dismiss. The Juvenile Court decision of October 25, 2003, was a reversal of the Juvenile Referee's decision of October 8, 2002, denying the Tribe's motion and motion to dismiss. The North Dakota Supreme Court, inter alia, applied a mere rational standard of review to equal protection issue, ignored the substantive due process issue, and held that the present manner of application of ICWA to the minor child is not unconstitutional.

1. Whether AB, a citizen of the United States and of the State of North Dakota, and an Indian child as that phrase is defined under ICWA, is entitled to the protections of the Constitution of the United States of America and the Constitution of the State of North Dakota and thus entitled to due process and equal protection afforded other children under relevant federal and state laws concerning the protection of children and whether review of the application of ICWA to an individual Indian child is subject to strict scrutiny under both equal protection and substantive due process analyses, thus the means employed must be narrowly tailored to meet a compelling governmental interest especially where the matter involves government action vis

a vis an individual child rather than the government action vis a vis a tribe.

2. Whether the existing Indian family doctrine should be applied here to prevent unconstitutional application of ICWA to the facts of this case.

3. Whether under fair application of ICWA to the facts of this case the Tribe's motion to transfer jurisdiction should have been denied because (a) the mother's prior veto of the Tribe's initial motion to transfer jurisdiction barred subsequent motion to transfer jurisdiction, (b) the motion was untimely, (c) the Tribal Court is an inconvenient forum, and/or (d) the best interests of the child should have been considered by the State courts.

4. Whether the United States Congress exceeded its authority under the Indian Commerce Clause and violated the Tenth Amendment of the United States Constitution in enacting ICWA.

PARTIES TO PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

All parties are listed on the cover.

Petitioner Norean Hoots, L.S.W., is not a corporate entity, nor is her employer Cass County Social Services.

Monty Mertz, Guardian ad Litem, on behalf of A.B., joining in the Petition, is not a corporate entity.

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CITATIONS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

In the Interest of A.B., 2003 ND 98, 663 N.W.2d 625 (opinion filed June 17, 2003).

In the Interest of A.B., A Child, Civil No. 09-02-J-0282, (Memorandum Opinion and Order on Request for Review of Juvenile Court, October 25, 2002).

In the Interest of A.B., A Child, Court File No. 09-02-J-0282, (Findings of Fact, Conclusions of Law and Order of Judicial Referee, October 8, 2002).

JURISDICTIONAL STATEMENT

The order sought to be reviewed was entered by the Supreme Court of the State of North Dakota on June 17, 2003. The Supreme Court of the State of North Dakota entered an order denying the petition for rehearing in this matter on August 20, 2003. Rule 12.5 is not relied upon. The statutory provision believed to confer jurisdiction on the Supreme Court of the United States to review on a writ of certiorari the order in question is: 28 U.S.C. §1257. Notification required by Rule 29.4(b) has been made to the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530-0001.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

U.S. Const. art. I, § 8, in pertinent part:

> The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]

U.S. Const. amend. V, in pertinent part:

> No person shall be ... be deprived of life, liberty, or property, without due process of law ...[.]

U.S. Const. amend. X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the united States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.D. Const. art. I, § 1:

> All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing

and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.

N.D. Const. art. I, § 12:

In criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf; and to appear and defend in person and with counsel. No person shall be twice put in jeopardy for the same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law.

N.D. Const. art. I, § 23.

The state of North Dakota is an inseparable part of the American union and the Constitution of the United States is the supreme law of the land.

The Indian Child Welfare Act, 25 U.S.C. 1901 et seq. (see appendix).

The Adoption and Safe Families Act of 1997 (Public Law 105-89) (adopted November 19, 1997) (amending Title IV of the Social Security Act, 42 U.S.C. 601 et seq.) (see appendix).

The Uniform Juvenile Court Act, N.D.C.C. ch. 27-20 (see appendix).

STATEMENT OF THE CASE[1]

The child, AB, is a female child having been born on May 1, 1993. AB's mother is KB, and her father is FB. KB is not an enrolled member of any federally recognized tribe. FB is an enrolled member of the Turtle Mountain Band of Chippewa (hereinafter Tribe). AB is either a member of or eligible for enrollment in the Tribe.

On March 3, 2001, AB, then age 7, came into protective custody of Cass County Social Services (hereinafter CCSS) due to her mother's early morning arrest on a DUI. KB subsequently advised police that her three children, then ages 7, 3, & 2, were home alone. On March 28, 2001, based upon the admission of KB and default of FB, AB was adjudicated deprived and was placed in the custody of CCSS for one year from March 28, 2001. The Tribe was notified of and had actual notice of AB's placement in foster care.

While there is conflicting information regarding where and with whom AB has lived for the first several years of her young life, AB clearly has had a tumultuous early childhood involving multiple care givers, instability, exposure to domestic violence in the home, chronic family violence and criminal activity, drug and alcohol use and abuse by care givers, physical and emotional neglect, and multiple parental absences due to their incarcerations.

In March 2001, CCSS made immediate relative placement

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[1]The statement of the case is fairly comprised based on the record below and Petitioner refers the Court to the Orders issued by the state courts. In the Interest of A.B., 2003 ND 98, 663 N.W.2d 625 (opinion filed June 17, 2003), App. 1-20; In the Interest of A.B., A Child, Civil No. 09-02-J-0282, (Memorandum Opinion and Order on Request for Review of Juvenile Court, October 25, 2002), App. 21-30; and In the Interest of A.B., A Child, Court File No. 09-02-J-0282, (Findings of Fact, Conclusions of Law and Order of Judicial Referee, October 8, 2002), App. 31-37.

of AB with her paternal grandmother, HL. On October 15, 2001, HL contacted Norean Hoots, L.S.W., of CCSS, demanding that AB be removed from her home stating she couldn't deal with AB and wanted AB moved. AB was then placed by CCSS in a highly skilled, attentive, stable foster home and did very well in this setting, despite having many emotional, behavioral and academic needs.

On November 15, 2001, Ms. Hoots spoke with Marilyn Poitra, ICWA worker for the Tribe, and apprised Ms. Poitra of the developments of the case. Ms. Poitra then advised Ms. Hoots that the Tribe would not intervene and approved of AB's current placement. Throughout the course of AB's placement with CCSS, KB and FB made little effort or progress towards reunification with AB. On January 24, 2002, the permanency planning team approved recommendation to seek a termination of parental rights and refer AB for adoption. On or about February 4, 2002, KB's probation on an underlying Aggravated Assault conviction was revoked and she was sentenced to two years incarceration. KB has a significant criminal history for assaultive behavior, a history of domestic violence between KB and the fathers of her children, and a history of unresolved chemical dependancy issues.

On February 6, 2002, Ms. Hoots was told by Ms. Poitra that the Tribe now wanted AB placed back with HL. On February 20, 2002, the Tribe filed a motion for transfer of jurisdiction and to dismiss case. On March 5, 2002, a hearing was held on a Review of Custody issue as well as on the Tribe's transfer motion. KB, appearing with counsel, objected to Tribe's motion to transfer, which was effectively a veto to such transfer. 25 U.S.C. § 1911(b)(mandating state court transfer of jurisdiction to tribal court upon motion of tribe unless parent object or there exists good cause to the contrary). The Referee subsequently denied the Tribe's motion to transfer and extended custody of AB in CCSS for one year from March 5, 2002.

On or about June 3, 2002, CCSS filed a petition seeking a termination of parental rights (hereinafter TPR).[2] At that time, KB was incarcerated, had not addressed chemical dependence or violence issues and had allowed her brother, a convicted sex offender, to reside with her and her two other minor children (who at the time were wards of their father's tribe, the Three Affiliated Tribes). FB had had very little contact with the child since she had been placed with CCSS and placement of AB into the home of FB was not approved by the state of Washington, a requirement under the Interstate Child Placement Compact. See generally N.D.C.C. Ch. 14-13.

Upon the filing of the TPR petition, the Juvenile Court promptly issued a notice of right to intervene with all supporting documents to the Tribe and issued a scheduling order setting the arraignment for June 25, 2002, pretrial conference for July 30, 2002, and trial for August 7, 2002. The Tribe did not make an appearance or respond by the arraignment date, and did not file motions to intervene, to transfer jurisdiction, or to dismiss the case until July 23, 2002. CCSS did hurriedly file a brief in opposition to the Tribe's Motion for Transfer of Jurisdiction and to Dismiss on July 29, 2002, and filed a Supplemental Brief in Opposition to Tribe's Motion to Transfer raising constitutional arguments on or about September 19, 2002.

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[2]The county is mandated by state and federal law to file a petition seeking the termination of parental rights where a child has been in foster care for a specified period of time. See N.D.C.C. § 27-20-20.1 ("a petition for termination of parental rights must be filed ...[i]f the child has been in foster care... for at least four hundred fifty out of the previous six hundred sixty nights"); see also Adoption and Safe Families Act, Pub. Law. 105-89, Sec. 103 (codified at 42 U.S.C. § 675(5)) ("in the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months ... the State shall file a petition to terminate the parental rights of the child's parents").

At the pretrial hearing on July 30, 2002, the transfer issue could not be fairly addressed due to the Tribe's inadequate notice of motion, and the resulting lack of opportunity for non-movant's, including KB's counsel and the guardian ad litem, to prepare a response; thus, hearing on the motion to transfer was delayed and the trial date indefinitely postponed. Briefing in support of Transfer of Jurisdiction from KB and the Tribe was not filed until August 19, 2002, and August 22, 2002, respectively, and at the Tribes's request, the Juvenile Court again delayed hearing on the motion to transfer until September 23, 2002. In the interim, the Tribe had interposed a motion to exclude evidence of best interests of the child to which CCSS responded.

At the September 23, 2002, hearing, the Referee granted the Tribe's motion to exclude evidence related to the best interests of the child. The Referee heard legal arguments on the multiple issues briefed by the parties, including the constitutional issues raised by CCSS. The parties who had not briefed the constitutional issues were not prohibited from supplementing the record with written materials on those issues; however, the Referee did state that she would not rely on the constitutional issues in her decision.

Subsequently, the Referee denied the Tribe's Motion to Transfer Jurisdiction and Dismiss Case for good cause as allowed by 25 U.S.C. § 1911. The Referee concluded that AB's connection to the Tribe was "merely genetic," presumably applying at least in part the existing Indian family doctrine; that the Tribe's Motion was untimely under the totality of the circumstances including that the Tribe had knowledge of the events and proceedings in the case for over 16 months, that its motion had caused further delay in the proceedings, and that the state Court jurisdiction/forum was most appropriate.

The Tribe filed a Request for Review of Referee's Decision to the Juvenile Court. By Order dated October 25, 2002, filed

October 28, 2002, the Juvenile Court Judge reversed the Referee's decision, granted the Tribe's Motion to Transfer, and dismissed the case. The Juvenile Court Judge opined that the Referee refused to consider the constitutional arguments and that she was consequently precluded from considering the constitutional arguments.

By ruling issued June 17, 2003, the North Dakota Supreme Court held, *inter alia*, (1) that the Tribe's motion to transfer jurisdiction was not untimely, (2) that because the Tribal Court offered to sit in Fargo for proceedings it was not an inconvenient forum, (3) that best interests of the child is not a consideration for the threshold determination of whether there is good cause not to transfer jurisdiction to a tribal court, (4) rejected CCSS' position that strict scrutiny should be applied[3] when examining AB's rights to equal protection and due process under the State and Federal Constitutions, and (5) that ICWA is a rational exercise of Congressional power under the Indian Commerce Clause powers and that congress did not violate the Tenth Amendment of the United States Constitution. Although raised by Petitioner, none of the lower courts addressed the effect of KB's March 2002 veto of transfer of jurisdiction to the Tribal Court upon the Tribe's July 2002 motion for transfer.

This case is before the Court on a threshold issue regarding jurisdiction, that is, whether this termination of parental rights case should have proceeded before the State Juvenile Court in Cass County. It is Petitioners' position that the manner in which ICWA was applied here was not a legal application of

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[3]The North Dakota Supreme Court opinion reflects that CCSS argued that ICWA served no compelling governmental interest: this is inaccurate. CCSS argued that even assuming ICWA served a compelling governmental interest, that the statute was not sufficiently narrowly tailored to promote that interest.

ICWA and/or the application of ICWA here violated the child's right to due process, both procedural and substantive, and her right to equal protection of and under state and federal child protection laws.

ARGUMENT IN SUPPORT OF ALLOWANCE OF THE WRIT

This Petition for a Writ of Certiorari should be granted because a state court of last resort has (1) decided an important federal question in a way that conflicts with other state court's of last resort,[4] (2) a state court has decided an important question of federal law that has not been, but should be settled by this Court,[5] and (3) a state court has decided an important federal question in a way that conflicts with relevant decisions of the Court.[6]

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[4]There is a conflict between the state courts whether the existing Indian Family doctrine is an appropriate application of Congressional policy and/or constitutional application of ICWA or an inappropriate judicially created exception to plain language of ICWA. Discussed infra. There is also a conflict between the state courts whether best interests of the child are properly considered by a court when deciding a transfer motion.

[5]The North Dakota Supreme Court has decided an important question of federal law by holding that ICWA is a proper exercise by Congress of the powers granted under the Indian Commerce Clause and not violative of the Tenth Amendment. Discussed infra. Further, the North Dakota Supreme Court has applied rational basis of review to an equal protection issue; the proper level of scrutiny is an important question of federal law. Discussed infra.

[6]The North Dakota Supreme Court's application of rational review to the equal protection issue conflicts with relevant decisions of the United States Supreme Court. The United States Supreme Court has applied strict scrutiny when examining equal protection issues raised by or for Indians as individuals. E.g., Grutter v. Bollinger, 123 S.Ct. 2325 (2003).

1. **Whether AB, a citizen of the United States, a resident of the State of North Dakota, and an Indian child as that phrase is defined under ICWA, is entitled to the protections of the Constitution of the United States of America and the Constitution of the State of North Dakota and thus entitled to due process and equal protection afforded other children under relevant federal and state laws concerning the protection of children and whether review of the application of ICWA to an individual Indian child is subject to strict scrutiny under both equal protection and substantive due process analyses, thus the means employed must be narrowly tailored to meet a compelling governmental interest especially where the matter involves government action vis a vis an individual child rather than the government action vis a vis a tribe.**

AB is not only an "Indian child" as that term is defined by the ICWA, but she is a citizen of the State of North Dakota and the United States of America, and thus entitled to the protections of the federal and state constitutions, including substantive due process and equal protection. In promulgating the Indian Child Welfare Act, Congress declared that it was its policy to serve the best interests of Indian children, and promote the stability and security of Indian families and tribes. 25 U.S.C. § 1902. However, the interests of Indian children, families and tribes are often in tension. In re Santos Y., 112 Cal.Rptr.2d 692, 715 (Cal. Ct. App. 2001).

A. Substantive Due Process: Rights in Domestic Security and Relationships are Fundamental.

Constitutional principles govern family rights, and children themselves hold fundamental rights and interests in family

relationships which are of constitutional dimension and which do not necessarily depend on the existence of a biological relationship. In re Santos Y., 112 Cal.Rptr.2d at 718. A child's constitutionally protected interests can under certain circumstances outweigh those of the biological parents, and can also under certain circumstances outweigh statutorily created interests of a Tribe. See id. ICWA must yield to a child's fundamental constitutional right to a stable and secure placement.

Family rights are recognized as fundamental and enjoy substantive due process / strict scrutiny analysis under the Constitution of the United States. E.g., Santosky v. Kramer, 455 U.S. 745, 753 (1982) (noting that matters of family life are fundamental liberty interests protected by the Fourteenth Amendment). The United States Supreme Court has also recognized that children enjoy constitutional protections as well as adults. In re Gault, 387 U.S. 1, 13 (1967) ("neither the Fourteenth Amendment nor the Bill of Rights is for adults alone"); Carey v. Population Servs. Int'l., 431 U.S. 678, 692 (1977) ("minors, as well as adults, are protected by the constitution and possess constitutional rights"). Similarly, the North Dakota Supreme Court has recognized that children enjoy constitutional protections. Bergstrom v. Bergstrom, 296 N.W.2d 490, 495 (N.D. 1980). The North Dakota Supreme Court has also noted that while "[t]he natural rights of parents to their children are fundamental and are constitutionally protected," parental "rights are not absolute or unconditional, and parents must provide care that satisfies minimum community standards," and a "child's health and safety are the paramount concern." In the Interest of N.H. and B.H., 2001 ND 143, ¶17; 632 N.W.2d 451. Children have a fundamental right to stable and permanent placement. In re Santos, 112 Cal.Rptr.2d at 725 (commenting that a child has a constitutional right to a reasonable directed early life, unmarked

by unnecessary and excessive shifts in custody). AB is entitled for this Court to address whether or not her constitutional rights outweigh the tribe's statutory rights here.

Further, domestic and familial relations are recognized as fundamental right subject to substantive due process analysis and strict scrutiny under both the federal and North Dakota constitutions. The pursuit of happiness guaranteed by N.D. Const. art. I, § 1, includes "the right to enjoy the domestic relations and the privileges of the family . . . without restriction or obstruction . . . except in so far as may be necessary to secure the equal rights of others," which is protected by the due process clause of N.D. Const. art. I, § 12. Hoff v. Berg, 1999 ND 115, ¶15; 595 N.W.2d 285. The North Dakota Supreme Court has in the past employed strict scrutiny when analyzing statutory intrusions on familial fundamental rights. Id. at ¶16. "[T]he idea of strict scrutiny acknowledges that [] political choices . . . burdening fundamental rights . . . must be subjected to close analysis in order to preserve substantive values of equality and liberty." Id. (quoting Laurence H. Tribe, American Constitutional Law, §16-6, p.1451 (2d ed. 1988)). Here, the North Dakota Supreme failed to even acknowledge AB's fundamental interest at issue, let alone apply a strict scrutiny to her case. Legislation which substantially interferes with the enjoyment of a fundamental right is subject to strict scrutiny, and must be set aside or limited unless it serves a compelling purposed and is necessary to the accomplishment of the purpose. Sherbert v. Verner, 374 U.S. 398 (1963).

A primary issue then is whether Tribal interests which the ICWA purports to promote are compelling under substantive due process standards to justify the impact implementation of ICWA would have on the child's constitutionally protected fundamental right to stable and permanent placement and, if so, whether the application of ICWA, under the facts here, is sufficiently narrowly tailored to further that interest. Assuming

Tribal interests which ICWA purports to promote are compelling, it is CCSS's position that the Tribal interest in self-preservation is not served by disrupting the bonds and security established by an individual child while in foster care for over 16 months. A child's fundamental right to remain where she has been safe and secure for a substantial period of time outweighs the late assertion and exercise of Tribal interest which would expose the child to renewed instability, uncertainty and insecurity in placement and relationships. In this case, the North Dakota Supreme Court failed to acknowledge or address the substantive due process issues raised.

B. Equal Protection: Classification Based on Genetics is Suspect.

Legislation concerning a "suspect" classification involving an immutable characteristic, such as race, ethnicity or ancestry, is subjected to strict scrutiny by the courts, and legislation is upheld only if its classification is precisely tailored to further a compelling governmental interest. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by reviewing court under strict scrutiny). In Adarand Constructors, Inc. v. Pena, the United States Supreme Court found that benign race-based presumptions, even those favorable to minorities, were still subject to strict scrutiny. Id. Since ICWA is triggered by genetic association, whether characterized as racial, ethnic, ancestry or blood quantum, strict scrutiny analysis is invoked to determine whether the classification serves a compelling governmental interest and is narrowly tailored to achieve that interest.

The North Dakota Supreme Court rejected CCSS'

assertion that the compelling interest standard applies to its constitutional challenges to ICWA. App. 18. However, equal protection applies to individuals, not groups, and all government action related to race is subject to strict scrutiny. See Grutter v. Bollinger, 123 S.Ct. 2325, 2337-38 (2003) (commenting that equal protection analysis "protects *persons*, not *groups*, [thus] all governmental action based on race ... should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed") (emphasis in original) (citation omitted). The United States Supreme Court has very recently applied strict scrutiny to an equal protection issue involving special treatment of Indians, among other minority groups, and did not distinguish the Indian minority and apply a rational basis test to that sub-group. See id. (applying strict scrutiny to equal protection challenge to law school admission policy which reflect commitment to racial and ethnic diversity with specific reference to Native Americans, among other groups); see also Gratz v. Bollinger, 123 S.Ct. 2411 (2003) (applying strict scrutiny to equal protection challenge to undergraduate admissions guidelines which considered race as a factor with specific reference to Native Americans, among other groups).

In Grutter, the Supreme Court emphasized that "all racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny ... [which] means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests. Grutter v. Bollinger, 123 S.Ct. at 2337-38. The Supreme Court went on to note that strict scrutiny review did not necessarily lead to invalidating the use of race as a factor, but emphasized rather that the narrow-tailoring requirement must be satisfied. Id. at 2338. The Court in Grutter held that the Law School has a compelling interest in attaining a diverse student body, id. at 2339, and that the admission policy at issue was sufficiently

narrowly tailored to meet that compelling interest, id. at 2347. (noting the Law School's "highly individualized, holistic review of each applicant's file"). In Gratz, the Supreme Court found the undergraduate admissions guidelines were not sufficiently narrowly tailored to survive strict scrutiny under equal protection analysis. Gratz v. Bollinger, 123 S.Ct. 2411, 2427-28 (where policy automatically distributed one-fifth of the points needed to guarantee admission to every single under represented minority applicant, including Native Americans, solely because of race). The Supreme Court opinions in Gratz and Grutter support a "highly individualized, holistic review" here of how ICWA, the Adoption and Safe Families Act, and the Uniform Juvenile Court Act, codified at Chapter 27-20 of the North Dakota Century code, shall apply and interact with respect to the individual child, AB, whose connection with the Tribe is primarily genetic.

Again, assuming that the governmental interest underlying ICWA is compelling, ICWA is not sufficiently narrowly tailored to achieve the interest of Tribal preservation or promotion. There is no evidence on the record that the application of ICWA actually leads to Tribal preservation or promotion, especially where the parents of the child to which the Act is being applied are not enmeshed in the Tribal community which is asserting standing. Here, the mother is not herself enrolled in any federally recognized tribe, had previously objected to tribal involvement, and is unavailable to provide for the child. The father has spent most of the child's life half a continent away from Tribal lands, has maintained very little contact with the child and has effectively abandoned the child.

The Equal Protection Clause of the United State's Constitution forbids the government from treating differently persons who are in all relevant respects alike. Baldock v. Workers Comp., 554 N.W.2d 441, 444 (N.D. 1996) (citation

omitted). Article I, Sections 21 and 22, of the North Dakota Constitution provides the North Dakota state constitutional guarantee of equal protection, and "do not prohibit legislative classifications or mandate identical treatment of different categories of persons but, rather, subject legislative classifications to different standards of scrutiny, depending upon the right that may be infringed by the challenged classification." Baldock v. Workers Comp., 554 N.W.2d 441, 444 (N.D. 1996) (citation omitted). The North Dakota Supreme Court applies "strict scrutiny to an inherently suspect classification or infringement of a fundamental right and strike down the challenged statutory classification unless it is shown that the statute promotes a compelling governmental interest and that the distinctions drawn by the law are necessary to further its purpose.'" Baldock, 554 N.W.2d at 444 (internal quotation omitted). Application of the ICWA to a child whose connection with an Indian tribe is primarily genetic does not serve the purpose for which the ICWA was enacted, i.e., "to protect the bests interests of Indian children and to promote the stability and security of Indian tribes and families." In re Santos Y., 112 Cal.Rptr. at 731; 25 U.S.C. § 1902.

The primary purpose of the North Dakota statutes relating to deprivation proceedings and terminations of parental rights is to protect the welfare of children. In the Interest of A.M. and C.M., 1999 ND 195, ¶ 6, 601 N.W.2d 253, 255 (N.D. 1999); see also generally N.D.C.C. Ch. 27-20, App. 93-151. Federal statutes address deprivation and termination proceedings as well. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89 (1997) (amending various sections of Title 42 of the United States Code), App. 59-92. The application of the ICWA to AB deprives her of equal protection of these state and federal statutes. The ICWA requires the Court to treat Indian children differently from non-Indian children. Blind application of ICWA, coupled with excessive delay and/or failure of the Tribe

to proffer appropriate placement options for the child, increases the likelihood that an Indian child's placement will be disrupted and permanence delayed. The only basis for applying ICWA here, rather than purely state law, is the child's genetic heritage. For example, if the child was domiciled on the reservation, then not only would it have been quite unlikely the child would have ever come into the sites of CCSS, but the state courts would not have had jurisdiction of the matter in the first instance. See 25 U.S.C. § 1911 (tribe has exclusive jurisdiction of child custody proceeding involving an Indian child residing or domiciled on the reservation); Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) (same).

The cases relied upon by the North Dakota Supreme Court to reject the assertion that individual Indians are entitled to strict scrutiny/equal protection analysis are not focused on application of federal and/or state laws on individual Indians, but rather on more global tribal concerns. E.g., Washington v. Confederated Bands and Tribes of Yakima, 439 U.S. 463, 500-501(1979) (examining relationship of tribe vis a vis state); Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 84-85 (1977) (addressing entitlement to distribution from federal government and noting that plenary power of Congress in matters of Indian affairs does not mean that all federal legislation concerning Indians is immune from judicial scrutiny); Fisher v. District Court, 424 U.S. 382 (1976) (examining relation of tribal members vis a vis tribe and finding that the tribal court had exclusive jurisdiction in adoption matter); Morton v. Mancari, 417 U.S. 535, 554 (1974) (examining employment criterion promoting Indian self government and limiting finding to facts of case). These cases do not stand for the premise that individual Indians are not entitled to equal protection of state and federal laws, and thus strict scrutiny review of application of those laws to their

individual circumstances.

Furthermore, recent opinions of the United States Supreme Court appear to strengthen individual rights vis a vis governmental intrusion, e.g., Lawrence v. Texas, 123 S.Ct. 2472 (June 26, 2003) (holding Texas statute making it a crime for two consenting adult males to engage in sexual relation in the privacy of a home unconstitutional), and states' rights vis a vis Congressional intrusion, United States v. Lopez, 514 U.S. 549, 567 (1995) (Gun-Free School Zones Act exceeded Congress' commerce clause authority, since possession of gun in local school zone was not economic activity that substantially affected interstate commerce). Further, the Supreme Court has recognized it own fallibility. In Lawrence v. Texas, the Supreme Court recently discussed the doctrine of stare decisis noting that the doctrine is not an "inexorable command." 123 S.Ct. 2472, 2483 (citation omitted) (overruling Bowers v. Hardwick, 478 U.S. 186 (1986), and declaring criminal sodomy statute unconstitutional as applied to consenting adults of the same sex). When laws once thought "necessary and proper" are later determined to "serve only to oppress," they are properly struck down. Lawrence v. Texas, 123 S.Ct. at 2484 ("As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."). To the extent that prior decisions of the United States Supreme Court ignore necessity of applying strict scrutiny to equal protection issues and/or substantive due process issues relating to Indians as individuals, the Court should revisit the same.

The North Dakota Supreme Court did not appropriately scrutinize the manner in which ICWA was applied to AB in light of her status as a citizen entitled to due process and equal protection. The child AB, as a citizen of the United States of America and the State of North Dakota, is entitled to the protection afforded children under all relevant state and federal

child protection laws, (i.e., the Adoption and Safe Families Act of 1997 and the Uniform Juvenile Court Act as enacted by North Dakota), the same as any other child in her position is so entitled to protection. The appropriate level of scrutiny to be applied by the courts is strict scrutiny under both an equal protection analysis and substantive due process analysis under both the federal and state constitutions.

2. Whether the existing Indian family doctrine should be applied here to prevent unconstitutional application of ICWA to the facts of this case.

Some courts have applied an analysis known as the "existing Indian family doctrine" and subsequently have not applied ICWA where a child is not being removed from an existing Indian family. See Matter of Adoption of Baby Boy L., 643 P.2d 168 (Kan. 1982). The doctrine is based on the premise that ICWA should not be applied where its purpose, i.e., the improper removal of Indian children from their Indian families, would not be served. Some courts apply the doctrine as an exception to the applicability of ICWA unless the child's biological parent or parents are not only of Indian descent, but also maintain a significant social, cultural or political relationship with their tribe. See, e.g., In re Bridget R., 49 Cal.Rptr.2d 507 (Cal. Ct. App. 1996). State courts do conflict with regard to the applicability of the existing Indian family doctrine, with some courts finding that the purposes of ICWA cannot be achieved by applying ICWA where there is little more than genetic connection with the tribe,[7] and with other

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[7] S.A. v. E.J.P., 571 So.2d 1187 (Ala. Ct..App..1990) (determining the rationale behind the existing Indian family doctrine persuasive and supported by legislative history); In re Santos Y., 112 Cal.Rptr.2d 692 (Cal. Ct. App. . 2001) (applying existing Indian family doctrine as constitutional

acceptable application of ICWA); Matter of Adoption of T.R.M., 525 N.E.2d 298) (Ind.1988) (questioning ICWA's constitutionality in general as violative of Tenth Amendment; not applying ICWA to the present case noting Congressional purpose and intent not satisfied); Matter of Adoption of Baby Boy L., 643 P.2d 168 (Kan. 1982) (noting that the "underlying thread that runs throughout" ICWA "is concerned with the removal of Indian children from an existing Indian family unit and the resultant breakup of the Indian family" and applying exception to uphold intent); Rye v. Weasel, 934 S.W.2d 257 (Ky.1996) (following the Supreme Court of Oklahoma as a leading states in developing the Existing Indian Family Doctrine, and agreeing that the doctrine "does not create an exception not contemplated by the legislature" but rather acknowledges that "preservation of the existing Indian family was an integral purpose of the ICWA from its inception"); Hampton v. J.A.L, 658 So.2d 331(La.Ct.App.1995) (reviewing jurisprudence of existing Indian family doctrine and concluding "that Congress intended the Act apply only in situations involving the removal of children from an existing Indian family and Indian environment" and noting conclusion bolstered by subsequent lack of Congressional amendment); In Interest of S.A.M., 703 S.W.2d 603 (Mo.App.1986) (applying existing Indian family doctrine and noting that relationship between child and complaining biological parent did not sufficiently constitute an Indian family); In re Adoption of Baby Girl S., 690 N.Y.S.2d 907 (Surr. Ct., Westchester Cty. 1999) (agreeing with Supreme Courts of Oklahoma and Kentucky, noting Congress's failure to enact the 1987 amendments which would have eliminated the existing Indian family doctrine can be interpreted as supporting its continued application, and applying existing Indian family doctrine; distinguishing characterization of the existing Indian family doctrine as a judicially created exception contrary to the plain language of the ICWA and concluding that the application of the ICWA would not further the policies behind it or be in the best interests of the child in the case); Matter of S.C., 833 P.2d 1249 (Ok.1992) (discussing the existing Indian family doctrine, disagreeing that doctrine creates an exception not contemplated by the legislature, but rather noting that preservation of an existing Indian family was an integral purpose of the ICWA and noting that interpretation is supported by Congress failing to amend in light of awareness of this interpretation); In re Morgan, 1997 WL 716880 (Tenn. Ct. App. . Nov. 19, 1997) (acknowledging wariness of state court created exception to a federal statute, but noting necessity of interpreting any statute, federal or state, mindful of its purpose, and concluding existing Indian

courts finding that the doctrine is an impermissible judicially created exception to the Act itself.[8] It appears to Petitioner that the existing Indian family doctrine is also entwined in the constitutional analysis, to the extent that if the purposes of the Act are not met by its application in a given circumstance, then the Act is not sufficiently narrowly tailored to meet a compelling governmental interest.

In its opinion regarding AB, the North Dakota Supreme Court announced that "[t]he judicial adoption of an exception to ICWA would thwart a tribe's interest in its Indian children and ignore the plain language of ICWA, which does not require an Indian child to be part of an existing Indian family or the family to be involved with the tribe." App. 18. However, upon careful examination, one discerns that application of the existing Indian family doctrine is not a court's simplistic effort to ignore plain language of, or thwart application of, ICWA; but rather a purposeful application of ICWA in a constitutionally sound manner, i.e., finding that broad application of ICWA is not always appropriate and recognizing that ICWA is not sufficiently narrowly tailored to constitutionally be applied in some circumstances. Promotion

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family doctrine sound); Matter of Adoption of Crews, 825 P.2d 305 (Wash. 1992) (applying existing Indian family doctrine and noting the while child may meet definition of "Indian child" noting ICWA inapplicable when Indian child not being removed from existing Indian environments).

[8]Matter of Adoption of T.N.F., 781 P.2d 973) (Alaska 1989) (rejecting the existing Indian family doctrine; Michael J., Jr. v. Michael J., Sr., 7 P.3d 960 (Ariz. Ct. App. .2000) (same); Matter of Baby Boy Doe, 849 P.2d 925 (Idaho 1993) (same); In re Adoption of S.S., 657 N.E.2d 935 (Ill. 1995) (same); In re Elliott, 554 N.W.2d 32 (Mich. Ct. App. . 1996) (same); In re Welfare of S.N.R., 617 N.W.2d 77 (Minn. Ct. App. .2000) (same); Matter of Adoption of a Child of Indian Heritage,543 A.2d 925 (N.J.1988) (same); Matter of Adoption of Baade, 462 N.W.2d 485 (S.D.1990) (same); Interest of D.A.C., 933 P.2d 993 (Utah Ct. App. .1997) (same).

of tribal interests under ICWA and the Constitution can coexist, but only when the application ICWA can be accomplished without treading unconstitutionally on competing interests, such as those of the individual child. The doctrine recognizes that where the child and/or child's family are not connected socially, culturally or politically to the tribe, then the goal of ICWA, to promote and sustain the tribe, can not be constitutionally achieved by subjecting a stranger child to tribal court jurisdiction.

3. **Whether under fair application of ICWA to the facts of this case the Tribe's motion to transfer jurisdiction should have been denied because (a) the mother's prior veto of the Tribe's initial motion to transfer jurisdiction barred subsequent motion to transfer jurisdiction, (b) the motion was untimely, (c) the Tribal Court is an inconvenient forum, and/or (d) the best interests of the child should have been considered by the State courts.**

A likely cause of difficulty in the application of ICWA in a fair, consistent, and constitutional manner is that there are no binding federal regulations promulgated to put the promises and goals of the Act into smooth practice and facilitate the application of the Act to specific cases with fair consideration and balancing of the individual rights of the children directly affected by ICWA's application. For guidance, courts and practitioners can and do look to non-binding guidelines published by the Bureau of Indian Affairs. E.g., In re Interest of C.W., 479 N.W.2d 105, 112-113 (Neb. 1992) (citing Guidelines for State Courts in Indian Child Custody Proceedings, 44 Fed. Reg. 67584-67595, Vol. 44, No. 228, Nov. 26, 1979 (hereinafter BIA Guidelines); see also Matter of Dependency and Neglect of A.L., 442 N.W.2d 233 (S.D. 1989)

(BIA Guidelines on what constitutes "good cause" for refusal to transfer proceeding on termination of parental rights to jurisdiction of tribe are not binding and are interpretative, rather than legislative). Nonetheless, as has been seen in this case, there are no specified parameters within which the Tribes' must respond or act, and issues of timeliness of response, intervention, petition for transfer of jurisdiction, waiver, laches, forum non conveniens, effect of veto on subsequent motion for transfer, etc., are left to the state courts to determine on a case by case basis.

Here, CCSS did raise pertinent arguments with regard to the fair application of the ICWA to the circumstances here, and the Juvenile Referee, who had shepherded the case for approximately 16 months at the time the TPR was filed, who was best situated to make the decision regarding the fair application of ICWA to the case at hand, did indeed agree with CCSS the transfer to the Tribe was not appropriate. App. 31-37. The Juvenile Court and North Dakota Supreme Court, with little development of the facts of the case, took a much more conservative, pure-comity minded approach with regard to what if anything could or should be expected from the Tribe. The Juvenile Court and North Dakota Supreme Court did not place any level of responsibility on the Tribe had to act in a timely manner or in a manner consistent with the child's best interests.[9]

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[9]The Juvenile Referee granted the Tribes' motion to exclude evidence with regard to the best interests of the child. The Juvenile Court and North Dakota Supreme Court agreed on this issue. It is Petitioner's postiion that the child's best interests are of paramount concern to any court dealing with a child's custody and life circumstances. There is a conflict among state courts which have addressed the issue. Compare e.g., In re Interest of C.W., 479 N.W.2d 105 (Neb. 1992) (a child's bests interest may override tribal or family interests); and Matter of T.S., 801 P.2d 77 (Mont. 1990) (best interest of child is a proper factor considered) with In re Armell,

Cass County, the county in which the child had been in protective custody for over 16 months at the initiation of the TPR proceeding, was the most appropriate venue for the TPR action as most all information pertinent and relevant to the petition was situated in the County of Cass.[10] The Tribe's motion was untimely, whether the relevant time period is triggered on the date the child entered protective custody or on the date the TPR petition itself is filed, as the motion at issue here made was made on the eve of trial and after the child had been in care in Cass County for over 16 months.[11] It is Petitioner's further position that a motion for transfer of jurisdiction made by a tribe after a prior motion to transfer jurisdiction to the Tribe is vetoed by the mother is simply barred because to hold otherwise would indefinitely subject state court proceedings to collateral attack and create instability in the hoped for permanency of the child, a goal of another federal law, the Adoption and Safe Families Act (provisions also reflected in the Uniform Juvenile Court Act set out in Chapter 27-20 of the North Dakota Century Code).

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550 N.E.2d 1060 (Ill. Ct. App. 1990) (child's best interest inapplicable regarding motion to transfer to tribal court).

[10]See fn 2, supra (explaining federal and state mandate that TPR petitions be filed when a child has been in foster care for a long time).

[11]ICWA provide no timeframe within which a tribe must respond after receiving notice to state court proceedings in order to preserve tribal rights under the Act. This is an affront to procedural due process. Cf. Fed.R.Civ.P. 12(a) (providing 20 days after being served with a summons and complaint for a defendant to answer and defend). The North Dakota Supreme Court did acknowlege that the Tribe delayed seven weeks after getting notice prior to filing the motion for transfer. App. 10.

4. Whether the United States Congress exceeded its authority under the Indian Commerce Clause and violated the Tenth Amendment of the United States Constitution in enacting ICWA.

A substantial nexus must exist between Congress' exercise of an enumerated power and the activity regulated by that exercise and when Congress exceeds its authority to act, the United States Supreme Court will invalidate such legislation. See, e.g., Solid Waste Agency of Northern Cook County v. Army Corps of Engineers, 531 U.S. 159 (2001) (holding enactment of Migratory Bird Act exceeded congressional power under the interstate commerce clause); United States v. Morrison, 529 U.S. 598 (2000) (striking civil remedy provision of the Violence Against Women Act as beyond congressional power under the interstate commerce clause); United States v. Lopez, 514 U.S. 549, 567 (1995) (Gun-Free School Zones Act exceeded Congress' commerce clause authority, since possession of gun in local school zone was not economic activity that substantially affected interstate commerce). It is CCSS's position that no substantial nexus exists between the Indian commerce clause and ICWA.

Commerce has been defined as the "exchange of goods, productions, or property of any kind; the buying selling and exchanging of articles." Black's Law Dictionary 269 (6th ed. 1990) (citing Anderson v. Humble Oil & Ref. Co., 174 S.E.2d 415 (Ga. 1970)). The definition of commerce has also included "transportation of persons and property by land, water and air." Id. (citing Union Pac. R. Co. v. State Tax Comm'r, 429 P.2d 983 (Utah 1967)). Commerce with Indian tribes has been defined by the Court as "commerce with individuals belonging to such tribes, in the nature of buying, selling, and exchanging commodities, without reference to the locality where carried on, though it be within the limits of a state." Id. (citing United

States v. Holliday, 70 U.S. 407, 3 Wall. 407, 18 L.Ed. 182 (1865)). Children are not goods, chattel or property. Children are not commodities to be bought, sold, or exchanged for money or other gain, including political capital. Children, including Indian children, are our most vulnerable individual citizens and necessarily entitled to protections provided under federal and state laws enacted for that very purpose.

The ICWA impermissibly intrudes on a power reserved to the states, that is, the care of deprived children. See Troxel v. Granville, 530 U.S. 57, 88 (2000) (Stevens, J. Dissenting) (acknowledging State's long recognized interests as *parens patriae* and child's own interest in preserving relationships that serve child's welfare and protection) (citations omitted); see also Schall v. Abrams, 467 U.S. 253, 265 (1984) ("if parental control falters the state must play its part as *parens patriae*"). Congress overreached in enacting ICWA as there is no nexus, let alone a substantial nexus, between the protection of deprived children and commerce with Indian tribes; thus ICWA cannot stand.

CONCLUSION

For the reasons set out above, the petition for writ of certiorari to the Supreme Court of the State of North Dakota

should be granted.

Dated this 12th day of November, 2003.

Respectfully submitted,

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And in all things joined by the undersigned, pursuant to Rule 12.4 of the Rules of the Supreme Court of the United States.

Dated this 12th day of November, 2003.

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(2)

Supreme Court, U.S.
FILED

No: 03 784 NOV 17 2003

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In The
Supreme Court of The United States

In the Interest of A.B., A Child.

Norean Hoots, L.S.W., of Cass County Social Services, and Monty Mertz, Guardian ad Litem, on behalf of A.B.,
Petitioners,
v.
K.B., F.B., and Turtle Mountain Band of Chippewa,
Respondents.

On Petition For Writ of Certiorari
To The Supreme Court of The State of North Dakota

APPENDIX

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA
2003 ND 98

In the Interest of A.B.
Norean Hoots, L.S.W., Petitioner and Appellant
v.
K.B., Respondent and Appellee F.B., A.B., and Monty Mertz, Guardian ad Litem, Respondents Turtle Mountain Band of Chippewa, Intervener and Appellee
No. 20020309

Appeal from the Juvenile Court of Cass County, East Central Judicial District, the Honorable Cynthia Rothe-Seeger, Judge.
AFFIRMED.

Opinion of the Court by VandeWalle, Chief Justice.

[¶1] Norean Hoots, a social worker with Cass County Social Services, ("Cass County") appealed from a juvenile court order granting a motion by the Turtle Mountain Band of Chippewa Indians ("Turtle Mountain Tribe") under the Indian Child Welfare Act ("ICWA"), 25 U.S.C. § 1901 et seq., to transfer jurisdiction of a parental termination proceeding from state juvenile court to the Turtle Mountain Tribal Court ("Tribal Court"). We affirm the transfer, holding the juvenile court did not commit reversible procedural error in overturning a judicial referee's recommendation to deny the motion to transfer, holding the juvenile court did not err in transferring jurisdiction of the child custody proceeding to Tribal Court, and holding the application of ICWA to the minor child is not unconstitutional.

I

[¶2] A.B. was born in 1993. A.B.'s biological father, F.B., and her paternal grandmother, H.L., are enrolled members of the Turtle Mountain Tribe, and A.B. is eligible for membership

in the Turtle Mountain Tribe. A.B. is therefore an "Indian child" under ICWA. See 25 U.S.C. § 1903(4). During the time relevant to this appeal, F.B. was living in the state of Washington. On March 3, 2001, A.B. was living with her mother, K.B., in Cass County, when K.B. was arrested for driving under the influence. K.B. advised police that A.B., then age 7, and two younger siblings were home alone. A.B. was placed in protective custody, and after a March 2001 juvenile court determination that she was deprived, Cass County placed her in foster care with H.L., who was living in Fargo. At the request of H.L., Cass County placed A.B. in a non-Indian foster home in October 2001. In February 2002, K.B.'s probation was revoked, and she was sentenced to two years in jail. In a motion filed on February 20, 2002, the Turtle Mountain Tribe moved under ICWA to transfer jurisdiction of child custody proceedings involving A.B. from the state juvenile court to Tribal Court. K.B. objected, and the juvenile court refused to transfer jurisdiction to Tribal Court. See 25 U.S.C. § 1911(b) (providing, in part, state court shall transfer proceeding to jurisdiction of tribe, absent objection by either parent).

[¶3] On June 3, 2002, Cass County petitioned the juvenile court to terminate the parental rights of K.B. and F.B. In a motion dated July 17, 2002, and filed on July 23, 2002, the Turtle Mountain Tribe moved under ICWA to transfer jurisdiction of the proceeding involving A.B. from state juvenile court to Tribal Court. K.B. did not object to this motion to transfer jurisdiction. After a September 23, 2002 hearing, a judicial referee recommended denying the motion to transfer jurisdiction, concluding it was not timely because the proceeding was at an advanced stage and a transfer of jurisdiction to Tribal Court would create a forum inconveniens. The Turtle Mountain Tribe sought review of the referee's decision under N.D. Sup. Ct. Admin. R. 13. The juvenile court reversed the referee's recommendation, concluding the Turtle

Mountain Tribe's motion to transfer was made within seven weeks after Cass County's petition to terminate parental rights was filed and was timely. The juvenile court also concluded the Tribal Court was not an inconvenient forum. The juvenile court granted the Turtle Mountain Tribe's motion to transfer jurisdiction to Tribal Court and dismissed the state court petition to terminate parental rights.

II

[¶4] In In the Interest of D.Q., 2002 ND 188, ¶¶ 8-9, 653 N.W.2d 713 (citations omitted), we outlined our relevant standards of review of a juvenile court proceeding initially heard by a referee and then reviewed by a district court:

> "[A] district court's review of a judicial referee's findings and recommendations under Administrative Rule 13, § 11(b), when it is a review of the record, is governed by Rule 53, N.D.R.Civ.P." "Under Rule 53(f)(2), N.D.R.Civ.P., the district court was obliged to accept the referee's findings unless they were clearly erroneous. . . . The correctness of a referee's findings is an issue that must be determined by the district court in the first instance." When the district court rejects a judicial referee's factual findings, this Court employs a two-step review of the district court's factual determinations:
>
> A judicial referee's conclusions of law are fully reviewable in the district court, and the district court's conclusions of law are fully reviewable upon appeal to this Court.
>
> In proceedings under the Uniform Juvenile Court Act, this Court's review of a juvenile court decision is governed by N.D.C.C. § 27-20-56, which provides, in part, that an appeal from a juvenile court's final order, judgment, or decree "must be heard by the supreme court upon the files, records, and minutes or transcript of the evidence of the juvenile court, giving appreciable weight

to the findings of the juvenile court." "This court's review of a juvenile court's order is similar to a trial de novo." "We independently review the evidence, and our review is not limited to a determination of whether the juvenile court's findings are clearly erroneous." "We afford the juvenile court's findings appreciable weight, but we are not bound by them."

III

[¶5] Cass County argues the juvenile court erred in not allowing it adequate time to respond to the Turtle Mountain Tribe's request for review of the referee's decision and in reversing the referee's decision without reviewing a tape or transcript of the evidentiary hearing before the referee.

[¶6] The referee recommended denying the Turtle Mountain Tribe's motion to transfer jurisdiction in a decision issued on October 8, 2002. In a petition dated October 16, 2002, and filed with the juvenile court on October 21, 2002, the Turtle Mountain Tribe sought review of the referee's decision under N.D. Sup. Ct. Admin. R. 13, which provides, in part:

Section 11. Procedure for Review.

(a) A review of the findings and order may be ordered at any time by a district court judge and must be ordered if a party files a written request for a review within three days after receiving the notice in Section 10(b). The request for review must state the reasons for the review.

(b) The review by a district court judge must be a review of the record, unless the court orders a hearing of the proceeding.

On October 25, 2002, without a response from Cass County and apparently without reviewing a tape or transcript of the hearing before the referee, the juvenile court reversed the referee's decision.

[¶7] In In the Interest of L.A.G., 1999 ND 219, ¶¶ 6-8, 602 N.W.2d 516, we considered similar issues in the context of

N.D. Sup. Ct. Admin. R. 13 and a juvenile court order reversing a referee's denial of the State's motion to transfer from juvenile court to district court the prosecution of a juvenile for felony possession of a controlled substance with intent to deliver. The referee recommended denial of the transfer, concluding the State had failed to establish probable cause to link the controlled substance to the juvenile. Id. at ¶ 4. The juvenile court reversed the referee's recommendation and transferred the prosecution to district court. Id. at ¶ 5.

[¶8] On appeal to this Court, the juvenile argued the juvenile court erred in failing to review a transcript of the hearing before the judicial referee and in not permitting his counsel to file a brief or argue legal issues at a hearing during the review process. L.A.G., 1999 ND 219, ¶ 6, 602 N.W.2d 516. The hearing before the judicial referee was recorded by shorthand and the transcript prepared from the reporter's notes apparently was not available to the juvenile court when it reversed the referee's decision. Id. We assumed the juvenile court did not review a tape or transcript of the hearing before the judicial referee, and we concluded that claimed failure was harmless. Id. We said our review of a juvenile court's order was similar to a trial de novo, and we concluded all the relevant factual matters presented at the evidentiary hearing were not in dispute and were included in the record reviewed by the juvenile court. Id. at ¶ 7. We said the juvenile's counsel did not argue that any testimony during the evidentiary hearing contradicted the relevant facts developed in the police reports and affidavits reviewed by the juvenile court, and any failure by the juvenile court to review a transcript of the proceedings did not constitute reversible error. Id. at ¶¶ 6-7. In rejecting the juvenile's argument that the juvenile court erred in not permitting him to file a brief or argue legal issues at a hearing during the review process, we said the record did not reflect that the juvenile's counsel made any response to the State's petition for review, or

that the court prohibited the juvenile from responding. Id. at ¶ 8. We concluded the juvenile court did not commit reversible procedural error in its review of the referee's recommendation. Id.

[¶9] Under N.D. Sup. Ct. Admin. R. 13, § 11, a district court may order a review of a referee's findings and order at any time and must order a review if requested by a party within three days after receiving written notice of the right to review. The rule does not necessarily contemplate a response from an opposing party before a district court reviews a referee's decision and does not preclude an opposing party from asking a district court for reconsideration. Nothing in the current N.D. Sup. Ct. Admin. R. 13, required the juvenile court to allow a response from Cass County before the court considered the Turtle Mountain Tribe's request for review of the referee's decision.

[¶10] Moreover, the record before the juvenile court includes an affidavit of Hoots and an affidavit of Marilyn Poitra, the ICWA coordinator for the Turtle Mountain Tribe. Hoots and Poitra were the only witnesses who testified at the hearing before the judicial referee. The affidavits of Hoots and Poitra were part of the record, as well as the other juvenile court records leading up to the termination petition. Although Cass County claims there are disputed facts, we conclude the relevant facts necessary for the resolution of this case are not in dispute, and as we discuss in more detail later, the issues involved in this case are legal issues. Under these circumstances, we conclude the juvenile court's apparent failure to review a tape or transcript of the hearing was harmless, and the juvenile court did not commit reversible procedural error in its review of the judicial referee's recommendation.(1)

IV

[¶11] Cass County argues the juvenile court erred in reversing the referee's decision because there was good cause

under ICWA to deny the Turtle Mountain Tribe's motion to transfer jurisdiction to the Tribal Court. Cass County contends the Turtle Mountain Tribe's motion to transfer was not timely and the Tribal Court is an inconvenient forum.

[¶12] Congress enacted ICWA in 1978 as the product of a rising concern for the consequences of state welfare practices which resulted in the separation of many Indian children from their families and tribes through adoption or foster care placement in non-Indian homes. See Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1989). See also Jesse C. Trentadue and Myra A. DeMontigny, The Indian Child Welfare Act of 1978: A Practitioner's Perspective, 62 N.D. L. Rev. 487, 494-501 (1986). In enacting ICWA, Congress declared a national policy to

> protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

25 U.S.C. § 1902.

Congress explicitly found

> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;
>
> (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such

children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

25 U.S.C. § 1901.

[¶13] At the heart of ICWA is 25 U.S.C. § 1911, a dual jurisdictional scheme for child custody proceedings involving an Indian child. See Holyfield, 490 U.S. at 36. Under 25 U.S.C. § 1911(a), except where jurisdiction is vested in the State by existing Federal law, a tribal court has exclusive jurisdiction over a child custody proceeding involving an Indian child "who resides or is domiciled within the reservation" of that child's tribe. See Holyfield, at 36. In Holyfield, at 47-53, the United States Supreme Court defined domicile for an illegitimate minor child to mean the domicile of the child's mother.

[¶14] For an Indian child not domiciled or residing within the reservation of the child's tribe, 25 U.S.C. § 1911(b) creates concurrent but presumptive tribal court jurisdiction, see Holyfield, 490 U.S. at 36, and provides

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, that such transfer shall be subject to declination by the tribal court of such tribe.

[¶15] ICWA defines an "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of

an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). Under 25 U.S.C. 1903(1), a "child custody proceeding" means and includes foster care placement, termination of parental rights, preadoptive placement, and adoptive placement. A.B. is the biological minor child of F.B., an enrolled member of the Turtle Mountain Tribe, and is an "Indian child" under 25 U.S.C. § 1911(b). Absent good cause to the contrary, 25 U.S.C. § 1911(b) thus creates presumptive Tribal Court jurisdiction over any child custody proceeding involving A.B., including a foster care placement proceeding or a termination of parental rights proceeding.

[¶16] ICWA does not define "good cause to the contrary," but the Bureau of Indian Affairs has issued guidelines which, although not binding, are helpful for determining good cause. Department of the Interior, Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings--Part III, 44 Fed. Reg. 67583 et seq. (1979) ("BIA Guidelines"). See, e.g., People in Interest of J.L.P., 870 P.2d 1252, 1257 (Colo. Ct. ((App.). .). . 1994); In the Interest of Armell, 550 N.E.2d 1060, 1065 (Ill. Ct. ((App.). .). . 1990). The burden of establishing good cause to deny a transfer is upon the party opposing the transfer. BIA Guidelines, at 67591. See Interest of J.L.P., 870 P.2d at 1257; Armell, 550 N.E.2d at 1064. As relevant to this case, the BIA Guidelines state that good cause to deny transfer of a child custody proceeding to tribal court exists if the proceeding is at an advanced stage when the petition to transfer is received, or if the evidence to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses. BIA Guidelines, § C.3(b)(i) and (iii) at 67591.

A

[¶17] Here, the referee decided the relevant time period for determining whether the Turtle Mountain Tribe's motion to

transfer jurisdiction was timely was when Cass County initiated the foster care proceeding in March 2001. The referee effectively decided the foster care proceeding was part of the termination proceeding and concluded the July 2002 motion to transfer jurisdiction was filed at an advanced stage of the child custody proceeding and was untimely. The juvenile court disagreed, concluding the relevant time for deciding whether the July 2002 motion to transfer was timely was after Cass County filed the June 3, 2002 petition to terminate parental rights, because a foster care placement proceeding and a termination of parental rights proceeding are two separate proceedings under the definition of "child custody proceeding." See 25 U.S.C. § 1903(1). The juvenile court decided the Turtle Mountain Tribe filed its motion to transfer jurisdiction approximately seven weeks after the petition to terminate parental rights was filed, and the termination proceeding was not at an advanced stage when the transfer motion was filed.

[¶18] Under 25 U.S.C. § 1903(1), a "child custody proceeding" means and includes foster care placement, termination of parental rights, preadoptive placement, and adoptive placement. Foster care placement means "any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated." 25 U.S.C. § 1903(1)(i). A termination of parental rights proceeding means "any action resulting in the termination of the parent-child relationship." 25 U.S.C. § 1903(1)(ii). The plain language of those definitions distinguishes between a foster care placement proceeding and a termination of parental rights proceeding. By definition, a foster care placement proceeding seeks to temporarily remove an Indian child from the child's parent or Indian custodian without terminating parental rights, while a

termination of parental rights proceeding seeks to end the parent-child relationship. Those proceedings have different purposes in the realm of a "child custody proceeding." The plain language of 25 U.S.C. § 1911(b) authorizes transfer motions for either foster care placement proceedings or for termination of parental rights proceedings, and the judicial referee's interpretation of 25 U.S.C. § 1911(b) would subsume an Indian tribe's right to request transfer of a termination proceeding into its right to request transfer of an earlier foster care placement proceeding. The juvenile court's interpretation of "child custody proceeding" correctly distinguishes between proceedings for "foster care placement" and "termination of parental rights" and recognizes the different purposes that may trigger each proceeding. We conclude, as a matter of law, the juvenile court correctly interpreted ICWA to measure the relevant time period for a motion to transfer jurisdiction in this case from the filing of the petition to terminate parental rights.

[¶19] Cass County's petition to terminate parental rights was filed on June 3, 2002. In a motion dated July 17, 2002, and filed on July 23, 2002, the Turtle Mountain Tribe moved to transfer jurisdiction of the proceeding to Tribal Court. The Turtle Mountain Tribe's motion to transfer was some seven weeks after the petition to terminate parental rights was filed, and the transfer motion was filed about one week before a pre-trial conference and about two weeks before the scheduled trial.

[¶20] The commentary to the BIA Guidelines states that good cause exists to deny a transfer if a party waits until the case is almost complete and asks that it be transferred to another court and retried. BIA Guidelines, at 67590. The requirement for a timely motion to transfer is intended "to encourage the prompt exercise of the right to petition for transfer in order to avoid unnecessary delays [, because l]ong periods of uncertainty concerning the future are generally regarded as harmful to the well-being of children." Id. at

67591-67592. The requirement for a timely motion to transfer is a proven weapon against disruption caused by obstructionist tactics, because "[i]f a transfer petition must be honored at any point before judgment, a party could wait to see how the trial is going in state court and then obtain another trial if it appears the other side will win." Id. at 67590. The commentary to the BIA Guidelines indicates the requirement for a timely motion to transfer precludes a party from using delay tactics to "wear down the other side by requiring the case to be tried twice." Id. At a minimum, the BIA Guidelines contemplate that a motion to transfer is not timely if transfer would require a retrial.

[¶21] Whether a motion for transfer jurisdiction is timely is determined on a case-by-case basis, and some courts have held that transfer petitions are not timely if filed on the morning of trial, see In re Termination of Parental Rights of Wayne R.N., 757 P.2d 1333, 1335-36 (N.M. Ct. (App.). . 1988), or after trial has commenced. See In re Termination of Parental Rights of Laurie R., 760 P.2d 1295, 1299 (N.M. Ct. (App.). . 1988). Other courts have held that transfer motions filed after the final disposition of the case are not timely. See People in re S.G.V.E., 2001 SD 105, ¶¶ 25-28, 634 N.W.2d 88; Matter of A.P., 1998 MT 176, ¶ 22, 962 P.2d 1186.

[¶22] Here, we reject Cass County's characterization that the Turtle Mountain Tribe filed the transfer motion on the "eve of trial." Rather, the transfer motion was filed about seven weeks after the termination petition was filed and two weeks before the scheduled trial. Although the requirement for a timely motion encourages the prompt exercise of the right to transfer jurisdiction and the Turtle Mountain Tribe's motion to transfer could have been made earlier, under the circumstances of this case we agree with the juvenile court that the transfer motion was not at an advanced stage of the proceeding to terminate parental rights. We therefore conclude the motion to transfer jurisdiction was not untimely.

B

[¶23] The judicial referee also decided the Tribal Court would be a forum inconveniens, stating if the Turtle Mountain Tribe's motion to transfer jurisdiction was granted, the proceeding would be terminated and there would be no forum in which to present evidence related to the long term deprivation of A.B. and her best interests. The referee also stated all the evidence relating to the child's best interest was in the juvenile court's jurisdiction. The juvenile court rejected the referee's determination, concluding there was no hardship in transferring jurisdiction to the Tribal Court because the Tribal Court had offered to hear the case in Fargo. The juvenile court said a dismissal of the state termination proceeding was a procedural formality to allow the Tribal Court to take jurisdiction.

[¶24] The referee's decision reflects an erroneous conclusion that there would be no forum in which to present evidence related to the deprivation of A.B. and her best interests if the transfer was granted. The referee's conclusion ignores that ICWA gives the Tribal Court presumptive jurisdiction over child custody proceedings involving an Indian child and there is no reason to believe the Tribal Court will not fulfill its obligations regarding A.B. Moreover, the commentary to the BIA Guidelines states that application of a modified doctrine of "forum non conveniens" may limit transfers to cases involving Indian children who do not live very far from a reservation, but the problem may be alleviated by having tribal courts come to the witnesses and a transfer may be conditioned on having a tribal court meet in the city where the family lives. BIA Guidelines, at 67591. Because the Tribal Court has offered to sit in Fargo for proceedings relating to A.B., we see no reason for concluding the Tribal Court is unable to adequately deal with issues pertaining to A.B. We affirm the juvenile court's decision granting the transfer of jurisdiction to the Tribal Court.

V

[¶25] Cass County argues the judicial referee and the juvenile court erred in refusing to consider evidence regarding A.B.'s best interest in the context of the motion to transfer jurisdiction.

[¶26] Although one of the goals of ICWA is to protect the best interests of an Indian child, see 25 U.S.C. § 1902, the issue here is the threshold question regarding the proper forum for that decision. See Holyfield, 490 U.S. at 53 (stating Supreme Court asked to decide legal question of who makes custody determination of Indian child, not the outcome of the decision, which is placed in the hands of tribal court). We agree with those courts that have concluded the best interest of the child is not a consideration for the threshold determination of whether there is good cause not to transfer jurisdiction to a tribal court. See J.L.P., 870 P.2d at 1258-59; Armell, 550 N.E.2d at 1064-67; In re C.E.H., 837 S.W.2d 947, 954 (Mo. Ct. ((App.). .). . 1992); Matter of Guardianship of Ashley Elizabeth R., 863 P.2d 451, 456 (N.M. Ct. ((App.). .). . 1993); Yavapai-Apache Tribe v. Mejia, 906 S.W.2d 152, 169-70 (Tex. Ct. ((App.). .). . 1995).

VI

[¶27] Relying primarily on In re Santos Y., 112 Cal.Rptr.2d 692 (Cal. Ct. ((App.). .). . 2001), Cass County argues the transfer of jurisdiction to Tribal Court under ICWA and the circumstances of this case violated A.B.'s constitutional rights. The Turtle Mountain Tribe responds that Cass County did not raise this issue in the review before the juvenile court and is precluded from raising it on appeal.

[¶28] Cass County raised this constitutional issue at the hearing before the judicial referee, but the referee ruled in favor of Cass County without addressing it. The juvenile court reversed the referee's recommendation but did not address the constitutional issue. Whether a statute violates the federal or

state constitutions is a question of law and is fully reviewable on appeal. Best Products Co., Inc. v. Spaeth, 461 N.W.2d 91, 96 (N.D. 1990). Assuming, without deciding, that Cass County, as an entity with foster-care custody of A.B., has standing to raise her constitutional claims, because of our de novo review of juvenile court proceedings, we now consider and resolve the constitutional issue in order to infuse a degree of finality into these proceedings involving jurisdiction under ICWA for a child custody proceeding. See L.A.G., 1999 ND 219, ¶ 7, 602 N.W.2d 516.

[¶29] Cass County argues the transfer of jurisdiction to Tribal Court violates A.B's rights to substantive due process and to equal protection under the federal and state constitutions. Cass County asserts ICWA substantially interferes with A.B's fundamental right to a stable and permanent placement and requires different treatment for Indian and non-Indian children. Cass County argues strict scrutiny applies to ICWA's statutory intrusion on those rights and claims the Turtle Mountain Tribe's interests, which ICWA purports to promote, are not compelling under substantive due process and equal protection standards. Cass County argues "[b]lind application of the ICWA, coupled with excessive delay and/or failure of the Tribe to proffer appropriate placement options for children, increases the likelihood that an Indian child's placement will be disrupted and permanence delayed." Cass County urges us to apply the existing Indian family doctrine to prevent the unconstitutional application of ICWA to A.B. under the facts of this case.

[¶30] In Santos, 112 Cal.Rptr.2d at 699, the California Court of Appeals accepted similar arguments and held that application of ICWA to an Indian child was unconstitutional under the Fifth, Tenth, and Fourteenth Amendments to the United States Constitution. See also In re Bridget R., 49 Cal.Rptr.2d 507 (Cal. Ct. ((App.). .). . 1996). In Santos, 112 Cal.Rptr.2d at 726, the

court explained ICWA was unconstitutional as applied to a child whose "sole connection with the Tribe [was] a one-quarter 'Minnesota Chippewa Tribe' genetic contribution from an enrolled blood line, an enrollment based on that genetic contribution." The child, who was then two and a half years old, had been living in foster care since his birth and with his "de facto parents" since he was three months old, id. at 697, and there "was no Indian family" to preserve. Id. at 726.

[¶31] Under those circumstances, the court concluded ICWA violated the child's substantive due process rights:

> We do not disagree with the proposition that preserving Native American culture is a significant, if not compelling, governmental interest. We do not, however, see that interest being served by applying the ICWA to a multiethnic child who has had a minimal relationship with his assimilated parents, particularly when serving the tribal interests "can serve no purpose which is sufficiently compelling to overcome the child's fundamental right to remain in the home where he . . . is loved and well cared for, with people to whom the child is daily becoming more attached by bonds of affection and among whom the child feels secure to learn and grow."

Santos, 112 Cal.Rptr.2d at 726. The court also concluded ICWA violated the child's equal protection rights:

> "application of ICWA which is triggered by an Indian child's genetic heritage, without substantial social, cultural or political affiliations between the child's family and a tribal community, is an application based solely, or at least predominantly, upon race and is subject to strict scrutiny under the equal protection clause." The test we apply is whether the classification serves a "compelling governmental interest" and is "narrowly tailored" to achieve its goal.
>
> The facts upon which we relied in concluding that

> application of the ICWA to this Minor constituted a violation of substantive due process lead to the conclusion that application of the ICWA to the Minor constitutes a violation of equal protection of the laws under the Fifth and Fourteenth Amendments to the United States Constitution. The record reflects that the Minor has no association with the Tribe other than genetics, i.e., his one-quarter "Minnesota Chippewa blood" from an enrolled bloodline of the Tribe. Whether we characterize this genetic association as racial, ethnic, or ancestry, a determination based on "blood," on its face invokes strict scrutiny to determine whether the classification serves a compelling governmental interest and is narrowly tailored to achieve that interest. We find that it does not.

Santos, 112 Cal.Rptr.2d at 730 (citations omitted).

[¶32] The court further concluded there was not a substantial nexus between ICWA and the Indian Commerce Clause because

> Application of the ICWA to a child whose only connection with an Indian tribe is a one-quarter genetic contribution does not serve the purpose for which the ICWA was enacted, "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families". For the reasons discussed above, as applied to this minor, the ICWA impermissibly intrudes on a power reserved to the states, their care of dependent children.

Santos, 112 Cal.Rptr.2d at 731 (citations omitted).

[¶33] The decision by the California Court of Appeals in Santos was based, in large part, on an existing Indian Family exception to ICWA, in which courts have addressed tensions between the best interests of Indian children, families, and tribes by refusing to apply ICWA to situations in which an Indian child is not being removed from an existing Indian

family with a significant connection to the Indian community. Santos, 112 Cal.Rptr.2d at 715-17. The Santos court recognized a split of authority between state courts adopting the existing Indian Family exception and state courts declining to adopt the exception. See Santos, at 716-17 n.16 (stating nine courts had adopted the exception and nine had rejected it).

[¶34] To the extent Santos relies on an existing Indian Family exception, we reject that analysis because it is contrary to the plain language of ICWA, which was enacted not only to preserve interests of Indian children and Indian families, but also to protect a tribe's interest in the welfare of its children and the maintenance of its culture. See 25 U.S.C. §§ 1901, 1902. The judicial adoption of an exception to ICWA would thwart a tribe's interest in its Indian children and ignore the plain language of ICWA, which does not require an Indian child to be part of an existing Indian family or the family to be involved with the tribe. Moreover, the United States Supreme Court effectively undermined the existing Indian Family exception in Holyfield, 490 U.S. at 49-53, when it stated that ICWA reflects congressional concern about the impact on tribes by the large number of Indian children adopted by non-Indians and emphasized that the tribe has an interest in the child which is distinct and separate from the interest of the child or the parents.

[¶35] We also reject Cass County's assertion that the compelling interest standard applies to its constitutional challenges to ICWA.

[¶36] The United States Supreme Court has consistently rejected claims that laws that treat Indians as a distinct class violate equal protection. See Washington v. Confederated Bands and Tribes of Yakima Indian Nation, 439 U.S. 463, 499-502 (1979); Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 84-90 (1977); Fisher v. District Court, 424 U.S. 382, 390-91 (1976); Morton v. Mancari, 417 U.S. 535, 551-55

(1974). See also Matter of Appeal in Pima County, 635 P.2d 187, 193 (Ariz. Ct. (App.). . 1981); In re Marcus S., 638 A.2d 1158, 1159 (Me. 1994); Matter of Miller, 451 N.W.2d 576, 579 (Mich. Ct. (App.). . 1990); State ex rel. Children's Servs. Div. v. Graves, 848 P.2d 133, 134 (Or. Ct. (App.). . 1993); Matter of Guardianship of D.L.L. & C.L.L., 291 N.W.2d 278, 281 (S.D. 1980). The different treatment of Indians and non-Indians under ICWA is based on the political status of the parents and children and the quasi-sovereign nature of the tribe. See Pima County, at 193; Marcus S., at 1159; Miller, at 579; Graves, at 134; D.L.L. & C.L.L., at 281. We apply the rational basis test to Cass County's substantive due process and equal protection challenges, and we conclude ICWA is rationally related to the protection of the integrity of American Indian families and tribes and is rationally related to the fulfillment of Congress's unique guardianship obligation toward Indians. See Pima County, at 193; Marcus S., at 1159; Miller, at 579; Graves, at 134; D.L.L. & C.L.L., at 281. We hold ICWA does not deny A.B.'s right to equal protection or substantive due process.

[¶37] The Tenth Amendment reserves all nondelegated powers to the states. D.L.L. & C.L.L., 291 N.W.2d at 281. Congress derives its power to regulate Indian matters from Art. I, § 8 of the United States Constitution, which delegates to Congress the power to regulate commerce with Indian Tribes. Congress's plenary power to legislate Indian matters is well established, and we conclude ICWA is a rational exercise of that power which does not violate the Tenth Amendment. See D.L.L. & C.L.L., at 281.

VII

[¶38] We affirm the juvenile court order transferring jurisdiction of child custody proceedings involving A.B. to the

Tribal Court and dismissing the petition to terminate parental rights.[¶39] Gerald W. VandeWalle, C.J.
Carol Ronning Kapsner
Mary Muehlen Maring
William A. Neumann
Dale V. Sandstrom

Footnote: 1. We nevertheless recognize N.D. Sup. Ct. Admin. R. 13 does not provide detailed guidance for district court review of a judicial referee's decision, and we refer this rule to the Joint Procedure Committee for appropriate study.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
Supreme Court No.20020309

In the Interest of A.B.
Norean Hoots, L.S.W., Petitioner and Appellant
v.
K.B., Respondent and Appellee F.B., A.B., and Monty Mertz, Guardian ad Litem, Respondents Turtle Mountain Band of Chippewa, Intervener and Appellee.

This appeal having been heard by the court at the April Term and an opinion having been filed on June 17, 2003, by: Chief Justice Gerald W. Vandewalle, Justice William A. Neumann, Justice Dale V. Sandstrom, Justice Mary Muehlen Maring and Justice Carol Ronning Kapsner; and a petition for rehearing having been filed by Susan L. Bailey, for the Appellant Norean Hoots, L.S.W., and the court having considered the matter, it is hereby ORDERED AND ADJUDGED, that the petition be an is hereby DENIED. AND IT IS FURTHER ORDERED, that this cause be and it is hereby remanded to the District Court for further proceedings according to law, and the judgment of this Court.
Dated: August 20, 2003. By the Court: Gerald W. Vandewalle.

IN JUVENILE COURT
COUNTY OF CASS
STATE OF NORTH DAKOTA

IN THE INTEREST OF AUBRY BELGARDE, A CHILD.

Norean Hoots, Petitioner
v.
Kerena Belgarde, Francis Bruce, Aubry Belgarde, and Monty Mertz, Guardian ad Litem, Respondents

MEMORANDUM OPINION AND
ORDER ON REQUEST FOR REVIEW
Civil No. 09-02-J-0282

The above matter is before the Court on a Request for Review filed by the Turtle Mountain Band of Chippewa Indians. The request relates to Referee Janice Benson Johnson's Order dated October 8, 2002.

STATEMENT OF THE CASE

The child in this case, Aubry, is currently nine years old. Until she was three years old, Aubry lived with her mother, Kerena. Then Aubry's father, Francis, took her to live with him and his mother, Helen Lynn. Aubry lived periodically either with her mother, her father, or Helen over the next several years. Cass County Social Services placed Aubry in foster care on September 14, 2001. For a brief period of time Helen took custody of Aubry, but the child is presently in foster care in Cass County.

On June 3, 2002, the State filed a Petition to Terminate Parental Rights. Since Aubry is eligible for enrollment with the Turtle Mountain Band of Chippewa, on July 17, 2002, the tribe

filed a motion to transfer jurisdiction of the case to Turtle Mountain Tribal Court. The tribal court also offered to hold its proceedings in Fargo. The Referee found good cause to deny a transfer of the proceeding to the tribal court.

ISSUES

I. Whether the Referee was clearly erroneous in finding that the tribe did not promptly file its petition to transfer when the tribe filed the petition approximately seven weeks after the State filed its petition to terminate parental rights.

II. Whether the Referee was clearly erroneous in finding that the evidence necessary to decide the case could not be presented in the tribal court without undue hardship to the parties or the witnesses when the tribal court stated it would hold hearings in Fargo to take testimony.

III. Whether the Referee was clearly erroneous in applying the "existing Indian family doctrine" when North Dakota has not adopted that doctrine and the clear language of the Indian Child Welfare Act (hereinafter "ICWA") states that the act applies in this case.

ANALYSIS

This Court reviews a referee's findings of fact under the clearly erroneous standard. Schumacher v. Schumacher, 1999 ND 10, ¶ 4, 589 N.W.2d 185. A finding of fact is clearly erroneous if, after a review of the entire record, the court finds that it was based on an erroneous understanding of the law or the court is "left with a definite and firm conviction a mistake had been made." Id. A referee's conclusions of law, however, are fully reviewable. Steffes v. Steffes, 1997 ND 49, ¶ 8, 560 N.W.2d 888. A review by this court is a review of the record, unless the Court orders a hearing of the proceeding. N.D. Sup. Ct. Admin. R. 13, §11(b).

In any state court proceeding for the termination of parental rights to an Indian child, the state court, "in absence of good cause to the contrary, shall transfer such proceeding to the

jurisdiction of the tribe. . . ." 25 U.S.C.§ 1911(b). The ICWA does not define "good cause." In re J.W., 528 N.W.2d 657, 660 (Iowa Ct. App. 1995). However, the Bureau of Indian Affairs has issued guidelines for determining whether good cause exists. Id.

The parties agree that only two of these guidelines apply to this case. The first of these guidelines states that good cause not to transfer may exist if "[t]he proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing." Id. (quoting 44 Fed. Reg. 567,583, 67,591 (1979)). The second pertinent guideline states that good cause not to transfer may exist if "[t]he evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses." Id. (quoting 44 Fed. Reg. 567, 583, 67,591).

There is a presumption in favor of tribal court jurisdiction when the Indian child is not domiciled on the reservation. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 36 (1989). The ICWA "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." Id. At 37 (quoting H.R. Rep. No. 95-1386, at 23 (1978), reprinted in U.S. Code Cong. & Admin. News 1978, at 7546). "[A]n Indian child's lack of present contacts with a tribe or reservation should not be used to justify denying transfer, since tribes have a transcendent interest in developing a relationship with their members." In re Armell, 550 N.E.2d 1060, 1065 (Ill. Ct. App. 1990) (citing 44 Fed. Reg. 67,591).

I. Timeliness of the Transfer Petition

The ICWA defines "foster care placement"and "termination of parental rights" as two separate proceedings within its definition of "child custody proceeding." 25 U.S.C. § 1903(1). North Dakota similarly recognizes that these are

two separate proceedings. Compare N.D.C.C. § 27-20-45 ("Proceeding for Termination of Parental Rights") with N.D.C.C. § 27-20-30 ("Disposition of Deprived Child"). For purposes of determining whether the termination of parental rights proceeding is at an advanced stage, the court may only look at the termination proceeding. The separate proceedings related to foster care do not factor in to whether the termination proceeding is as an advanced stage. The following two cases also illustrate this point.

In In re J.W., the State filed its first petition for termination of parental rights in November 1991. 528 N.W.2d at 658. Since that petition was defective, the State filed a second one in May 1993. Id. Approximately seven months later, in December 1993, the tribe filed its petition to transfer jurisdiction. Id. at 659. The court stated that the proceedings were at an advanced stage and the tribe had not promptly filed its transfer petition. Id. at 660.

In In re Wayne R.N., the State filed its application for termination of parental rights in January 1987. 757 P.2d 1333, 1334 (N.M. Ct. App. 1988). Six months later, when the court started the hearing on the merits of the application, the tribe petitioned the court started the hearing on the merits of the application, the tribe petitioned the court to transfer the case to tribal court. Id. at 1335. The court held that his factor weighed against transferring the proceedings to tribal court. Id. at 1336.

In contrast to In re J.W. and In re Wayne R.N., the court in the case of In re Guardianship of Ashley Elizabeth R. did not find that good cause existed. 863 P.2d 451, 456 (N.M. Ct. App.1993). On September 3, 1993, the state received a petition for guardianship of two Indian children. Id. At 452-53. Approximately seven weeks later, on October 14, 1992, the tribe filed a motion to transfer the proceeding to tribal court. Id. At 453.

In this case, the Turtle Mountain Tribe filed its motion

to transfer approximately seven weeks after the petition to terminate parental rights was filed. Unlike In re J.W. or In re Wayne R.N., the motion to transfer was not filed months after the petition to terminate parental rights was filed. Also, the motion was not made at the beginning of the trial on the merits. Cf. In re Wayne R.N., 757 P.2d at 1335. In this case, the court had yet to take any action on the petition to terminate parental rights. The pretrial was scheduled to take place a week after the court received the motion to transfer jurisdiction. This proceeding was not at an advanced stage when the petition to transfer was received, and the petitioner did file the petition promptly after receiving notice. Therefore, this factor does not weight in favor of good cause.

The Referee's Order frequently refers to the prior foster care proceedings in her determination of whether this proceeding was at an advanced stage and whether the petition to transfer was filed promptly. Reliance on those separate proceedings is based on an erroneous understanding of the law. The Referee's inference that the Tribe's motion to transfer is untimely is clearly erroneous. See Schumacher, 1999 ND 10, ¶ 4, 589 N.W.2d 185 (stating that a finding of fact is clearly erroneous if based on an erroneous understanding of the law).

II. Undue Hardship to the Parties or Witnesses

The second applicable factor has been interpreted to allow state courts to apply a modified forum non conveniens doctrine. Yavapai-Apache Tribe v. Mejia, 906 S.W.2d 152, 165 (Tex. Ct. App. 1995). It is referred to as "modified" because generally forum non conveniens is used to refuse jurisdiction in the court's own forum where, in the ICWA context, it is used to refuse granting jurisdiction to the tribal court if the tribal court is found to be an inconvenient forum. Id. The court may consider factors including "amenability of the parties to personal jurisdiction, party and witness convenience, conflict of law rules, and 'any other factors having substantial

bearing upon the selection of a convenient, reasonable and fair place of trial.'" Commonwealth Land Title Ins. Co. v. Pugh, 555 N.W.2d 576, 579 (N.D. 1996) (citing Comment, Uniform Interstate and International Procedure Act, § 1.05).

The State argues that Belcourt is an inconvenient forum because all of the deprivation case history is located in Fargo, most of the witnesses are located in or around Fargo, and almost all of the evidence is located in the Fargo community. This argument is negated by the fact that the tribal court will travel to Fargo to take testimony from the witnesses here. The tribal court is not any more inconvenient that this Court since the witnesses would testify in the same city. The State and Cass County Social Services can transmit all of their information to the tribal court. See In re Armell, 550 N.E.2d at 1067 (stating that the social workers transmitted their DCFS reports to the tribal court). The evidence necessary to decide this case can be adequately presented in the tribal court without undue hardship to the parties or the witnesses. This factor does not weigh in favor of good cause.

The Referee did not analyze the significance of the tribal court sitting Fargo. This appears to be based upon a misunderstanding about the consequence of dismissing the case from this Court. The Referee apparently believed that if she were to dismiss this case, then nothing more would happen to it. The dismissal of the case is merely a procedural formality that allows the tribal court to take jurisdiction. The same situation arises with a motion to change venue. When a court grants a motion to change venue, it dismisses the action to allow the other court to take jurisdiction. Since the Referee did not apply the law on whether transfer would be an undue hardship, her decision on this factor is clearly erroneous.

Even if the tribal court had not decided to sit in Fargo to hear testimony from witnesses located here, there would still not be good cause under the undue hardship factor. The cases

that found undue hardship because witnesses would have to travel a long distance to reach the tribal court involved situations where the tribal court was located in another state. See In re J.W., 528 N.W.2d at 661 (majority of witnesses were in Iowa, and the Omaha Tribe is in Nebraska); In re Wayne R.N., 757 P.2d at 1336 (witnesses were in New Mexico, and the tribal court was in Oklahoma); In re J.J., 454 N.W.2d at 330 (witnesses were in South Dakota, and the tribal court was in North Dakota; Yavapai-Apache Tribe, 906 S.W.2d at 168 (witnesses were in Texas, and the Yavapai-Apache tribe is in Arizona). Even when the tribal court is located in another state, it is not necessarily an undue hardship. See In re Armell, 550 N.E.2d at 1067 (some witnesses were in Illinois, and the tribal court was in Kansas).

With regard to the distance issue, a similar case is In re J.J.. In that case, the state court was in Rapid City, South Dakota, and the tribal court was in Fort Yates, North Dakota. In re J.J., 454 N.W.2d at 330. The distance from Rapid City to Fort Yates is approximately 270 miles, and the distance from Fargo to Belcourt is approximately 250 miles. See Driving Directions<http://www.mapquest.com>. While the court in In re J.J. did find that it would be an undue hardship, it did quote from the district court's opinion to state that the witnesses "would be required to *leave the state* of South Dakota." 454 N.W.2d at 330 (emphasis added). When the tribal court is in a different state from the witnesses, there is a concern with whether the tribal court will be able to subpoena the witnesses. In re Wayne R.N., 757 P.2d at 1336. The case of In re J.J. is different from this case in several other respects including the timeliness factor. See 454 N.W.2d at 330 (stating that the children had been "in the system" for over five years).

If the Court were to accept the State's argument that having witnesses travel 250 miles within the state is an undue hardship, then the good cause exception would virtually

swallow the ICWA transfer provision. Accepting the State's argument would mean that only when the majority of the witnesses live on or near the reservation would the state court have to transfer jurisdiction to the tribal court. See In re Armell, 550 N.E.2d at 1067 ("Furthermore, liberal expansion of the forum non conveniens doctrine would preclude transferring jurisdiction to tribal courts except in case where the child resides on or near a reservation."). This result would be "contrary to the congressional findings and goals incorporated into the ICWA." Id.

The Referee's findings of fact on the undue hardship factor are clearly erroneous because she failed to apply the law. Since the tribal court will come to Fargo to take testimony from Fargo witnesses, and the State can transmit any other evidence and documents to the tribal court, there is no undue hardship.

III. Existing Indian Family Doctrine

The "existing Indian family doctrine" states that when neither the child nor the child's parents have maintained a significant social, cultural, or political relationship with his or her tribe, the ICWA does not apply. Barbara Ann Atwood, Flashpoints under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance, 51 Emory L.J. 587, 625 (2002). Approximately half the states that have considered the doctrine have adopted it and the other half have rejected it. In re Santos Y., 112 Cal. Rptr.2d 71 696, 716 (Cal. Ct. App 2001). North Dakota has not yet considered this doctrine.

The existing Indian family doctrine is contrary to the definitions of the ICWA. Whether the ICWA applies to a case is "contingent only upon whether an 'Indian child' is the subject of a 'child custody proceeding' as those terms are defined by the Act." In re Adoption of Baade, 462 N.W. 2d 485, 490 (S.D. 1990). An "Indian child" means "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the

biological child of a member of an Indian tribe." 25 U.S.C.§ 1903(4). A "child custody proceeding" includes "termination of parental rights." 25 U.S.C. § 1903 (l)(ii). Aubry is eligible for membership in an Indian tribe, and she is the biological child of a member of an Indian tribe. Any consideration of the significance of Aubry's or her parents' relationship to the tribe is not contemplated by this definition. To judicially add words to the definition of "Indian child" would be an unconstitutional invasion of the legislative branch of government.

The State argued the existing Indian family exception before the Referee.[1] While the Referee never mentions the doctrine by name, some of her findings indicate reliance on the doctrine. For example, the Referee states: "There is no evidence in the record that [Aubry} has ever lived on the Turtle Mountain reservation" and "Ms. Belgarde has not lived on the reservation at any time pertinent to these proceedings" and "Ms. Lynn did not then and does not now live on the reservation." Similar statements are also found in the Referee's Conclusions of Law. To the extent the Referee relied on the existing Indian family doctrine to deny transferring jurisdiction to the Turtle Mountain Tribal Court, it was based on an erroneous understanding of the law. The Referee's decision is clearly erroneous.

CONCLUSION

The Court is aware that transferring jurisdiction to the tribal court mean that Aubry will be placed with Helen, and the last time she was placed with her grandmother, Helen

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[1] The State also argued that the ICWA is unconstitutional, but the Referee refused to consider those arguments, which precludes this Court from considering them now. Neither the Tribe nor Kerena were given an opportunity to brief the issue of the ICWA's constitutionality.

returned the child to social services. Despite the feelings this Court may have about where the child should live, it is not for this Court to decide that question. Holyfield, 490 U.S. at 53. This Court is only permitted to decide the legal question of which court should be permitted to make the decision as to whether the parental rights of Kerena and Francis should be terminated. Id. The law places that decision in the hands of the Turtle Mountain Tribal Court. Id.

DECISION

IT IS ORDERED:

1. The Referee's Order, dated October 8, 2002, is hereby **REVERSED.**
2. The Turtle Mountain Band of Chippewa Indians' Motion to Transfer is **GRANTED**.
3. Case **DISMISSED**

BY THE COURT:

S/_____
Cynthia Rothe-Seeger
District Judge
East Central Judicial District

IN JUVENILE COURT
COUNTY OF CASS
STATE OF NORTH DAKOTA

IN THE INTEREST OF AUBRY BELGARDE, A CHILD.

Norean Hoots, Petitioner
v.
Kerena Belgarde, Francis Bruce, Aubry Belgarde, and Monty Mertz, Guardian ad Litem, Respondents.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
COURT FILE NO. 09-02-J-0282

The undersigned Judicial Referee states that a hearing was held September 23, 2002, pursuant to a Motion to Transfer Jurisdiction filed by the Turtle Mountain Tribe of Chippewa, dated July 17, 2002. Present in the Court were Assistant Cass County State's Attorney Susan Bailey; Attorney B.J. Jones on behalf of the tribe; the child's mother, Kerena Belgarde with her attorney, Douglas Nesheim; Guardian Ad Litem Attorney Monty Mertz; Ruby Knoll and Norean Hoots of Cass County Social Services; and Marilyn Poitra representing the tribe. The Tribe also entered a "Motion to Exclude," dated September 11, 2002. The Court heard testimony from Norean Hoots and Marilyn Poitra, statements of counsel and the opinion of the Guardian Ad Litem. The Court notes the companion deprivation case regarding this child J01-105. Following an introductory section, the Court makes it Findings of Fact, Conclusions of Law and Order.

INTRODUCTION

This matter came before the Court pursuant to the Indian Child Welfare Act (ICWA) at 25 USC § 1911(b) which

reads in pertinent part:

> In any state court proceedings for the foster care placement of, or termination or parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the child's tribe...

A State Court must, therefore, find "good cause" not to transfer jurisdiction. ICWA enumerates four examples of "guidelines" to consider when finding "good cause" or lack thereof. Two relate to the age of the subject child and are not relevant to the case of Aubry Belgarde. The other two issues are untimeliness of the intervention and the inconvenient forum that would result upon transfer of jurisdiction. This Court will address those matters.

The State wished to debate ICWA on constitutional grounds. The Court demurred. The Tribe did not want "best interest of the child" to enter the proceedings and the Court agreed.

It is understood that the underlying purpose of ICWA is the preservation of the Indian family. The Court begins its examination in the context.

FINDINGS OF FACT

I.

The Court has jurisdiction of the subject matter and the parties herein.

II.

The child, Aubrey Belgarde, is nine years old. There is not evidence in the record that she has ever lived on The Turtle Mountain reservation. The Tribe asserts that she is enrollable and that her father, Francis Bruce, is enrolled. Kerena Belgarde is not enrolled. Ms. Belgarde has not lived on the reservation at any tiMe pertinent to these proceedings. Francis Bruce lives in the state of Washington and has not participated in any of these State Court proceedings. The child's paternal grandmother is Helen Lynn and appears to be the motivating force behind the Tribe's motion.

III.

Aubry was placed by Cass County Social Services with Ms. Lynn in a formal foster care placement extending several months until November 2001. Ms. Lynn did not then and does not now live on the reservation.

"Timeliness"

IV.

The Tribe was served with pleadings and Notice of Rights to Intervene on June 5, 2002. Its Motion to Intervene was filed with the Clerk of District Court on July 23, 2002, five days prior to the pre-trial hearing which had been set by Scheduling Order which was served on the Tribe on June 5, 2002.

V.

The Court notes that proceedings did not really begin in June 2002 because termination of parental rights petitions are filed only after a proceeding period of time in which the parties are covered by Court Orders pursuant to a deprivation petition. A TPR action only comes after extensive efforts to re-unite the child with a parent and to successfully engage the parent in a plan to achieve that end.

VI.

The long and short of it is that Cass County Social

Services initiated contact with Marilyn Poitra about Aubry in March 2001, some 16 months before the Tribe filed its second motion to intervene. (Its first such motion was offered in a Review of Custody proceeding on file J01-105 in early 2002. In March 2002 Kerena Belgarde vetoed the Tribe's involvement.)

VII.

A considerable number of contacts were attempted by Cass County Social Services to Ms. Poitra, both by mail and phone, over the 16 months. It appears that not only was the tribe apprised of the events along the way, but their opinions and recommendations were sought. They did not actively respond until after Ms. Lynn had beseeched Cass County Social Services to take back the child because she couldn't care for her in November 2001. The child was put into an alternative foster home. A few days later Ms. Lynn changed her mind and wanted the child back. When Cass County Social Services refused, it seems Ms. Lynn took her case to Ms. Poitra and the Tribe, thus their motion to intervene in January 2001 which was rebuffed by Ms. Belgarde.

VIII.

To say the Tribe's second motion was untimely is open to interpretation. But the fact is, it brought the termination proceedings to a standstill. And it is disingenuous of the Tribe to say, as they did, that they got involved only a month after they had notice of the proceedings. Over a period of several months, when their assistance was actively sought, they did not respond.

IX.

Ms. Belgarde's reversal of her position to refuse tribal participation no doubt influenced the Tribe. Tribal representatives admit they would place the child back with Ms. Lynn. The undercurrent of family dynamics here is beyond the Court's ken. It is fair, to note, though, that the father has had

no part in any District Court proceedings.

Forum Inconveiens

X.

In finding that given venue would be a forum inconveiens more than mere physical distance may be considered. Here, the new venue would the Turtle Mountain Chippewa Tribal Court in Belcourt, North Dakota, more than 250 miles from Fargo. To rebut this Ms. Poitra assured this Court that the Tribal Court would be willing to come to Fargo. The question is for what purpose?

XI.

Were the Tribe's motion to be granted, this matter would not be transferred to their jurisdiction; it would be terminated altogether, for that is their request. Thus, then would be no reason for the Tribal Court to remove to Fargo- there would be no pending action.

XII.

Which brings up the crucial point: there would then be no forum in which to present evidence related to the long-term deprivation of this child and the vital evidence related to her best interests. It must be reiterated that the child has been within this jurisdiction during the entire pendancy of these matters, including the time she was in the physical custody of her grandmother. Cass County Social Services retained full custody of Aubry. And, until July 2002, it seemed to be agreeable to Kerena Belgarde.

XIII.

The Court is left with the feeling that some manipulation has been practiced - whether to keep out the kind of evidence that will be brought forward in state jurisdiction or for some other purpose, it is not possible to say. But it does not appear highly doubtful that "best interests" evidence would be sought if jurisdiction were transferred and this case dismissed.

XIV.

Guardian Ad Litem Attorney Monty Merty made a strong recommendation that the Court find good cause not to transfer jurisdiction.

CONCLUSIONS OF LAW

I.

The child, Aubry Belgarde, has never lived on an Indian Reservation; her father does not live on the reservation and had not participated in these proceedings; her mother has not lived on the reservation during these 18 months since first filing, nor is she enrolled; nor does the child's paternal grandmother live on the reservation. The "Indian Family" herein appears to be merely genetic.

II.

The Tribe's Motion to Transfer Jurisdiction and Dismiss Case is untimely, given the totality of the circumstances: it had notice of all events and proceedings in this jurisdiction over the 16 months prior to its motion and the motion was filed so far into the proceedings that it has already cause a delay of more than two months.

III.

The Tribe's motion would create a Forum Inconveneiens, in that it would eliminate any forum at all for evidence related to the child's best interest or at best make such presentations problematic. Clearly, all evidence related to the child's best interest is in this State Court jurisdiction and - crucially - the child's best interest needs to be evaluated.

ORDER

1. The Tribe's Motion to Exclude is granted.
2. The Tribe's Motion to Transfer Jurisdiction and Dismiss

Case is denied for good cause, as allowed by 25 USC § 1911.

IT IS SO ORDERED.

Dated this 8 day of October, 2002.

S/_____
Janice Benson Johnson
Judicial Referee
East Central Judicial District

U.S. Const. art. I, § 8:

The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post offices and post roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

To provide for organizing, arming, and disciplining, the

militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;--And

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

U.S. Const. amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

TITLE 25, CHAPTER 21

Sec. 1901. - Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds -

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes [1] " and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families

Sec. 1902. - Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote

the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs

Sec. 1903. - Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term -

(1) "child custody proceeding" shall mean and include -

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of

eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;
(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in 1606 of title 43;
(4) "Indian child" means any unmarried person who is under age eighteen and is either
(a) a member of an Indian tribe or
(b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;
(5) "Indian child's tribe" means
(a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;
(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;
(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;
(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of title 43;
(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been

acknowledged or established;
(10) "reservation" means Indian country as defined in section 1151 of title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;
(11) "Secretary" means the Secretary of the Interior; and
(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings

Sec. 1911. - Indian tribe jurisdiction over Indian child custody proceedings
(a) Exclusive jurisdiction
An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.
(b) Transfer of proceedings; declination by tribal court
In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by

the tribal court of such tribe.
(c) State court proceedings; intervention
In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.
(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes
The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity

Sec. 1912. - Pending court proceedings
(a) Notice; time for commencement of proceedings; additional time for preparation
In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall,

upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent

or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child

Sec. 1913. - Parental rights; voluntary termination

(a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the

parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.
(d) Collateral attack; vacation of decree and return of custody; limitations
After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law

Sec. 1914. - Petition to court of competent jurisdiction to invalidate action upon showing of certain violations
Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title

Sec. 1915. - Placement of Indian children
(a) Adoptive placements; preferences
In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with
(1) a member of the child's extended family;
(2) other members of the Indian child's tribe; or
(3) other Indian families.
(b) Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with -

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: Provided, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) Record of placement; availability
A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe

Sec. 1916. - Return of custody
(a) Petition; best interests of child
Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.
(b) Removal from foster care home; placement procedure
Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed

Sec. 1917. - Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court
Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the

individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship

Sec. 1918. - Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) Criteria applicable to consideration by Secretary; partial retrocession

(1) In considering the petition and feasibility of the plan of a tribe under subsection (a) of this section, the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not

feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.
(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval
If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.
(d) Pending actions or proceedings unaffected
Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title

Sec. 1919. - Agreements between States and Indian tribes
(a) Subject coverage
States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.
(b) Revocation; notice; actions or proceedings unaffected

Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise

Sec. 1920. - Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception

Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger

Sec. 1921. - Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard

Sec. 1922. - Emergency removal or placement of child; termination; appropriate action

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the

emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate

Sec. 1923. - Effective date

None of the provisions of this subchapter, except sections 1911(a), 1918, and 1919 of this title, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after November 8, 1978, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child

Sec. 1931. - Grants for on or near reservation programs and child welfare codes

(a) Statement of purpose; scope of programs

The Secretary is authorized to make grants to Indian tribes and organizations in the establishment and operation of Indian child and family service programs on or near reservations and in the preparation and implementation of child welfare codes. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall be a last resort.

Such child and family service programs may include, but are not limited to -

(1) a system for licensing or otherwise regulating Indian foster and adoptive homes;

(2) the operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care;

(4) home improvement programs;

(5) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;

(6) education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;

(7) a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate State standards of support for maintenance and medical needs; and

(8) guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings.

(b) Non-Federal matching funds for related Social Security or other Federal financial assistance programs; assistance for such programs unaffected; State licensing or approval for qualification for assistance under federally assisted program

Funds appropriated for use by the Secretary in accordance with this section may be utilized as non-Federal matching share in connection with funds provided under titles IV-B and XX of the Social Security Act (42 U.S.C. 620 et seq., 1397 et seq.) or under any other Federal financial assistance programs which contribute to the purpose for which such funds are authorized

to be appropriated for use under this chapter. The provision or possibility of assistance under this chapter shall not be a basis for the denial or reduction of any assistance otherwise authorized under titles IV-B and XX of the Social Security Act or any other federally assisted program. For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State

Sec. 1932. - Grants for off-reservation programs for additional services

The Secretary is also authorized to make grants to Indian organizations to establish and operate off-reservation Indian child and family service programs which may include, but are not limited to -

(1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate State standards of support for maintenance and medical needs;

(2) the operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; and

(4) guidance, legal representation, and advice to Indian families involved in child custody proceedings

Sec. 1933. - Funds for on and off reservation programs

(a) Appropriated funds for similar programs of Department of Health and Human Services; appropriation in advance for

payments
In the establishment, operation, and funding of Indian child and family service programs, both on and off reservation, the Secretary may enter into agreements with the Secretary of Health and Human Services, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health and Human Services: Provided, That authority to make payments pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.
(b) Appropriation authorization under section 13 of this title
Funds for the purposes of this chapter may be appropriated pursuant to the provisions of section 13 of this title

Sec. 1934. - "Indian" defined for certain purposes
For the purposes of sections 1932 and 1933 of this title, the term "Indian" shall include persons defined in section 1603(c) of this title

Sec. 1951. - Information availability to and disclosure by Secretary
(a) Copy of final decree or order; other information; anonymity affidavit; exemption from Freedom of Information Act
Any State court entering a final decree or order in any Indian child adoptive placement after November 8, 1978, shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show -
(1) the name and tribal affiliation of the child;
(2) the names and addresses of the biological parents;
(3) the names and addresses of the adoptive parents; and
(4) the identity of any agency having files or information relating to such adoptive placement.
Where the court records contain an affidavit of the biological

parent or parents that their identity remain confidential, the court shall include such affidavit with the other information. The Secretary shall insure that the confidentiality of such information is maintained and such information shall not be subject to the Freedom of Information Act (5 U.S.C. 552), as amended.

(b) Disclosure of information for enrollment of Indian child in tribe or for determination of member rights or benefits; certification of entitlement to enrollment

Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe

Sec. 1952. - Rules and regulations

Within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter

Sec. 1961. - Locally convenient day schools

(a) Sense of Congress

It is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families.

(b) Report to Congress; contents, etc.

The Secretary is authorized and directed to prepare, in

consultation with appropriate agencies in the Department of Health and Human Services, a report on the feasibility of providing Indian children with schools located near their homes, and to submit such report to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives within two years from November 8, 1978. In developing this report the Secretary shall give particular consideration to the provision of educational facilities for children in the elementary grades

Sec. 1962. - Copies to the States
Within sixty days after November 8, 1978, the Secretary shall send to the Governor, chief justice of the highest court of appeal, and the attorney general of each State a copy of this chapter, together with committee reports and an explanation of the provisions of this chapter

Sec. 1963. - Severability
If any provision of this chapter or the applicability thereof is held invalid, the remaining provisions of this chapter shall not be affected thereby

Public Law 105-89
105th Congress - First Session
Convening January 7, 1997
An Act to promote the adoption of children in foster care.
Be it enacted by the Senate and House of Representatives of the United States
of America in Congress assembled,
SECTION 1. SHORT TITLE; TABLE OF CONTENTS.
(a) SHORT TITLE.--This Act may be cited as the "Adoption and Safe Families Act of 1997".
(b) TABLE OF CONTENTS.--The table of contents of this Act is as follows:

Sec. 1. Short title; table of contents.
TITLE I--REASONABLE EFFORTS AND SAFETY REQUIREMENTS FOR FOSTER CARE AND ADOPTION PLACEMENTS
Sec. 101. Clarification of the reasonable efforts requirement.
Sec. 102. Including safety in case plan and case review system requirements.
Sec. 103. States required to initiate or join proceedings to terminate parental rights for certain children in foster care.
Sec. 104. Notice of reviews and hearings; opportunity to be heard.
Sec. 105. Use of the Federal Parent Locator Service for child welfare services.
Sec. 106. Criminal records checks for prospective foster and adoptive parents.
Sec. 107. Documentation of efforts for adoption or location of a permanent home.
TITLE II--INCENTIVES FOR PROVIDING PERMANENT FAMILIES FOR CHILDREN
Sec. 201. Adoption incentive payments.

Sec. 202. Adoptions across State and county jurisdictions.
Sec. 203. Performance of States in protecting children.
TITLE III--ADDITIONAL IMPROVEMENTS AND REFORMS
Sec. 301. Authority to approve more child protection demonstration projects.
Sec. 302. Permanency hearings.
Sec. 303. Kinship care.
Sec. 304. Clarification of eligible population for independent living services.
Sec. 305. Reauthorization and expansion of family preservation and support services.
Sec. 306. Health insurance coverage for children with special needs.
Sec. 307. Continuation of eligibility for adoption assistance payments on behalf of children with special needs whose initial adoption has been dissolved.
Sec. 308. State standards to ensure quality services for children in foster care.
TITLE IV--MISCELLANEOUS
Sec. 401. Preservation of reasonable parenting.
Sec. 402. Reporting requirements.
Sec. 403. Sense of Congress regarding standby guardianship.
Sec. 404. Temporary adjustment of Contingency Fund for State Welfare Programs.
Sec. 405. Coordination of substance abuse and child protection services.
Sec. 406. Purchase of American-made equipment and products.
TITLE V--EFFECTIVE DATE
Sec. 501. Effective date.
TITLE I--REASONABLE EFFORTS AND SAFETY REQUIREMENTS FOR FOSTER CARE AND ADOPTION PLACEMENTS
SEC. 101. CLARIFICATION OF THE REASONABLE

EFFORTS REQUIREMENT.
(a) IN GENERAL.--Section 471(a)(15) of the Social Security Act (42 U.S.C. 671(a)(15)) is amended to read as follows:
"(15) provides that--
"(A) in determining reasonable efforts to be made with respect to a child, as described in this paragraph, and in making such reasonable efforts, the child's health and safety shall be the paramount concern;
"(B) except as provided in subparagraph (D), reasonable efforts shall be made to preserve and reunify families--
"(i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; and
"(ii) to make it possible for a child to safely return to the child's home;
"(C) if continuation of reasonable efforts of the type described in subparagraph (B) is determined to be inconsistent with the permanency plan for the child, reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child;
"(D) reasonable efforts of the type described in subparagraph (B) shall not be required to be made with respect to a parent of a child if a court of competent jurisdiction has determined that--
"(i) the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse);
"(ii) the parent has--
"(I) committed murder (which would have been an offense under section 1111(a) of title 18, United States Code, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;
"(II) committed voluntary manslaughter (which would have

been an offense under section 1112(a) of title 18, United States Code, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;

"(III) aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter; or

"(IV) committed a felony assault that results in serious bodily injury to the child or another child of the parent; or

"(iii) the parental rights of the parent to a sibling have been terminated involuntarily;

"(E) if reasonable efforts of the type described in subparagraph (B) are not made with respect to a child as a result of a determination made by a court of competent jurisdiction in accordance with subparagraph (D)--

"(i) a permanency hearing (as described in section 475(5)(C)) shall be held for the child within 30 days after the determination; and

"(ii) reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child; and

"(F) reasonable efforts to place a child for adoption or with a legal guardian may be made concurrently with reasonable efforts of the type described in subparagraph (B);".

(b) DEFINITION OF LEGAL GUARDIANSHIP.--Section 475 of such Act (42 U.S.C. 675) is amended by adding at the end the following:

"(7) The term 'legal guardianship' means a judicially created relationship between child and caretaker which is intended to be permanent and self- sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: protection, education, care and control of the person, custody of the person, and decisionmaking. The term 'legal guardian' means the caretaker in such a relationship.".

(c) CONFORMING AMENDMENT.--Section 472(a)(1) of such Act (42 U.S.C. 672(a)(1)) is amended by inserting "for a child" before "have been made".
(d) RULE OF CONSTRUCTION.--Part E of title IV of such Act (42 U.S.C. 670-679) is amended by inserting after section 477 the following:
"SEC. 478. RULE OF CONSTRUCTION.
"Nothing in this part shall be construed as precluding State courts from exercising their discretion to protect the health and safety of children in individual cases, including cases other than those described in section 471(a)(15)(D).".
SEC. 102. INCLUDING SAFETY IN CASE PLAN AND CASE REVIEW SYSTEM REQUIREMENTS.
Title IV of the Social Security Act (42 U.S.C. 601 et seq.) is amended--
(1) in section 422(b)(10)(B)--
(A) in clause (iii)(I), by inserting "safe and" after "where"; and
(B) in clause (iv), by inserting "safely" after "remain"; and
(2) in section 475--
(A) in paragraph (1)--
(i) in subparagraph (A), by inserting "safety and" after "discussion of the"; and
(ii) in subparagraph (B)--
(I) by inserting "safe and" after "child receives"; and
(II) by inserting "safe" after "return of the child to his own"; and
(B) in paragraph (5)--
(i) in subparagraph (A), in the matter preceding clause (i), by inserting "a safe setting that is" after "placement in"; and
(ii) in subparagraph (B)--
(I) by inserting "the safety of the child," after "determine"; and
(II) by inserting "and safely maintained in" after "returned to".
SEC. 103. STATES REQUIRED TO INITIATE OR JOIN PROCEEDINGS TO TERMINATE PARENTAL RIGHTS FOR CERTAIN CHILDREN IN FOSTER CARE.

(a) REQUIREMENT FOR PROCEEDINGS.--Section 475(5) of the Social Security Act (42 U.S.C. 675(5)) is amended--
(1) by striking "and" at the end of subparagraph (C);
(2) by striking the period at the end of subparagraph (D) and inserting "; and"; and
(3) by adding at the end the following:
"(E) in the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months, or, if a court of competent jurisdiction has determined a child to be an abandoned infant (as defined under State law) or has made a determination that the parent has committed murder of another child of the parent, committed voluntary manslaughter of another child of the parent, aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter, or committed a felony assault that has resulted in serious bodily injury to the child or to another child of the parent, the State shall file a petition to terminate the parental rights of the child's parents (or, if such a petition has been filed by another party, seek to be joined as a party to the petition), and, concurrently, to identify, recruit, process, and approve a qualified family for an adoption, unless--
"(i) at the option of the State, the child is being cared for by a relative;
"(ii) a State agency has documented in the case plan (which shall be available for court review) a compelling reason for determining that filing such a petition would not be in the best interests of the child; or
"(iii) the State has not provided to the family of the child, consistent with the time period in the State case plan, such services as the State deems necessary for the safe return of the child to the child's home, if reasonable efforts of the type described in section 471(a)(15)(B)(ii) are required to be made with respect to the child.".
(b) DETERMINATION OF BEGINNING OF FOSTER

CARE.--Section 475(5) of the Social Security Act (42 U.S.C. 675(5)), as amended by subsection (a), is amended--
(1) by striking "and" at the end of subparagraph (D);
(2) by striking the period at the end of subparagraph (E) and inserting "; and"; and
(3) by adding at the end the following:
"(F) a child shall be considered to have entered foster care on the earlier of--
"(i) the date of the first judicial finding that the child has been subjected to child abuse or neglect; or
"(ii) the date that is 60 days after the date on which the child is removed from the home.".
(c) TRANSITION RULES.--
(1) NEW FOSTER CHILDREN.--In the case of a child who enters foster care (within the meaning of section 475(5)(F) of the Social Security Act) under the responsibility of a State after the date of the enactment of this Act--
(A) if the State comes into compliance with the amendments made by subsection (a) of this section before the child has been in such foster care for 15 of the most recent 22 months, the State shall comply with section 475(5)(E) of the Social Security Act with respect to the child when the child has been in such foster care for 15 of the most recent 22 months; and
(B) if the State comes into such compliance after the child has been in such foster care for 15 of the most recent 22 months, the State shall comply with such section 475(5)(E) with respect to the child not later than 3 months after the end of the first regular session of the State legislature that begins after such date of enactment.
(2) CURRENT FOSTER CHILDREN.--In the case of children in foster care under the responsibility of the State on the date of the enactment of this Act, the State shall--
(A) not later than 6 months after the end of the first regular session of the State legislature that begins after such date of

enactment, comply with section 475(5)(E) of the Social Security Act with respect to not less than 1/3 of such children as the State shall select, giving priority to children for whom the permanency plan (within the meaning of part E of title IV of the Social Security Act) is adoption and children who have been in foster care for the greatest length of time;

(B) not later than 12 months after the end of such first regular session, comply with such section 475(5)(E) with respect to not less than 2/3 of such children as the State shall select; and

(C) not later than 18 months after the end of such first regular session, comply with such section 475(5)(E) with respect to all of such children.

(3) TREATMENT OF 2-YEAR LEGISLATIVE SESSIONS.--For purposes of this subsection, in the case of a State that has a 2-year legislative session, each year of the session is deemed to be a separate regular session of the State legislature.

(4) REQUIREMENTS TREATED AS STATE PLAN REQUIREMENTS.--For purposes of part E of title IV of the Social Security Act, the requirements of this subsection shall be treated as State plan requirements imposed by section 471(a) of such Act.

(d) RULE OF CONSTRUCTION.--Nothing in this section or in part E of title IV of the Social Security Act (42 U.S.C. 670 et seq.), as amended by this Act, shall be construed as precluding State courts or State agencies from initiating the termination of parental rights for reasons other than, or for timelines earlier than, those specified in part E of title IV of such Act, when such actions are determined to be in the best interests of the child, including cases where the child has experienced multiple foster care placements of varying durations.

SEC. 104. NOTICE OF REVIEWS AND HEARINGS; OPPORTUNITY TO BE HEARD.

Section 475(5) of the Social Security Act (42 U.S.C. 675(5)), as amended by section 103, is amended--
(1) by striking "and" at the end of subparagraph (E);
(2) by striking the period at the end of subparagraph (F) and inserting "; and"; and
(3) by adding at the end the following:
"(G) the foster parents (if any) of a child and any preadoptive parent or relative providing care for the child are provided with notice of, and an opportunity to be heard in, any review or hearing to be held with respect to the child, except that this subparagraph shall not be construed to require that any foster parent, preadoptive parent, or relative providing care for the child be made a party to such a review or hearing solely on the basis of such notice and opportunity to be heard.".
SEC. 105. USE OF THE FEDERAL PARENT LOCATOR SERVICE FOR CHILD WELFARE SERVICES.
Section 453 of the Social Security Act (42 U.S.C. 653) is amended--
(1) in subsection (a)(2)--
(A) in the matter preceding subparagraph (A), by inserting "or making or enforcing child custody or visitation orders," after "obligations,"; and
(B) in subparagraph (A)--
(i) by striking "or" at the end of clause (ii);
(ii) by striking the comma at the end of clause (iii) and inserting "; or"; and
(iii) by inserting after clause (iii) the following:
"(iv) who has or may have parental rights with respect to a child,"; and
(2) in subsection (c)--
(A) by striking the period at the end of paragraph (3) and inserting "; and"; and
(B) by adding at the end the following:
"(4) a State agency that is administering a program operated

under a State plan under subpart 1 of part B, or a State plan approved under subpart 2 of part B or under part E.".

SEC. 106. CRIMINAL RECORDS CHECKS FOR PROSPECTIVE FOSTER AND ADOPTIVE PARENTS.

Section 471(a) of the Social Security Act (42 U.S.C. 671(a)) is amended--

(1) by striking "and" at the end of paragraph (18);

(2) by striking the period at the end of paragraph (19) and inserting "; and"; and

(3) by adding at the end the following:

"(20)(A) unless an election provided for in subparagraph (B) is made with respect to the State, provides procedures for criminal records checks for any prospective foster or adoptive parent before the foster or adoptive parent may be finally approved for placement of a child on whose behalf foster care maintenance payments or adoption assistance payments are to be made under the State plan under this part, including procedures requiring that--

"(i) in any case in which a record check reveals a felony conviction for child abuse or neglect, for spousal abuse, for a crime against children (including child pornography), or for a crime involving violence, including rape, sexual assault, or homicide, but not including other physical assault or battery, if a State finds that a court of competent jurisdiction has determined that the felony was committed at any time, such final approval shall not be granted; and

"(ii) in any case in which a record check reveals a felony conviction for physical assault, battery, or a drug-related offense, if a State finds that a court of competent jurisdiction has determined that the felony was committed within the past 5 years, such final approval shall not be granted; and

"(B) subparagraph (A) shall not apply to a State plan if the Governor of the State has notified the Secretary in writing that the State has elected to make subparagraph (A) inapplicable to

the State, or if the State legislature, by law, has elected to make subparagraph (A) inapplicable to the State.".

SEC. 107. DOCUMENTATION OF EFFORTS FOR ADOPTION OR LOCATION OF A PERMANENT HOME.

Section 475(1) of the Social Security Act (42 U.S.C. 675(1)) is amended--

(1) in the last sentence--

(A) by striking "the case plan must also include"; and

(B) by redesignating such sentence as subparagraph (D) and indenting appropriately; and

(2) by adding at the end the following:

"(E) In the case of a child with respect to whom the permanency plan is adoption or placement in another permanent home, documentation of the steps the agency is taking to find an adoptive family or other permanent living arrangement for the child, to place the child with an adoptive family, a fit and willing relative, a legal guardian, or in another planned permanent living arrangement, and to finalize the adoption or legal guardianship. At a minimum, such documentation shall include child specific recruitment efforts such as the use of State, regional, and national adoption exchanges including electronic exchange systems.".

TITLE II--INCENTIVES FOR PROVIDING PERMANENT FAMILIES FOR CHILDREN

SEC. 201. ADOPTION INCENTIVE PAYMENTS.

(a) IN GENERAL.--Part E of title IV of the Social Security Act (42 U.S.C. 670- 679) is amended by inserting after section 473 the following:

"SEC. 473A. ADOPTION INCENTIVE PAYMENTS.

"(a) GRANT AUTHORITY.--Subject to the availability of such amounts as may be provided in advance in appropriations Acts for this purpose, the Secretary shall make a grant to each State that is an incentive-eligible State for a fiscal year in an amount equal to the adoption incentive payment payable to the State

under this section for the fiscal year, which shall be payable in the immediately succeeding fiscal year.

"(b) INCENTIVE-ELIGIBLE STATE.--A State is an incentive-eligible State for a fiscal year if--

"(1) the State has a plan approved under this part for the fiscal year;

"(2) the number of foster child adoptions in the State during the fiscal year exceeds the base number of foster child adoptions for the State for the fiscal year;

"(3) the State is in compliance with subsection (c) for the fiscal year;

"(4) in the case of fiscal years 2001 and 2002, the State provides health insurance coverage to any child with special needs (as determined under section 473(c)) for whom there is in effect an adoption assistance agreement between a State and an adoptive parent or parents; and

"(5) the fiscal year is any of fiscal years 1998 through 2002.

"(c) DATA REQUIREMENTS.--

"(1) IN GENERAL.--A State is in compliance with this subsection for a fiscal year if the State has provided to the Secretary the data described in paragraph (2)--

"(A) for fiscal years 1995 through 1997 (or, if the first fiscal year for which the State seeks a grant under this section is after fiscal year 1998, the fiscal year that precedes such first fiscal year); and

"(B) for each succeeding fiscal year that precedes the fiscal year.

"(2) DETERMINATION OF NUMBERS OF ADOPTIONS.--

"(A) DETERMINATIONS BASED ON AFCARS DATA.--Except as provided in subparagraph (B), the Secretary shall determine the numbers of foster child adoptions and of special needs adoptions in a State during each of fiscal years 1995 through 2002, for purposes of this section, on the basis of data meeting the requirements of the system established

pursuant to section 479, as reported by the State and approved by the Secretary by August 1 of the succeeding fiscal year.

"(B) ALTERNATIVE DATA SOURCES PERMITTED FOR FISCAL YEARS 1995 THROUGH 1997.--For purposes of the determination described in subparagraph (A) for fiscal years 1995 through 1997, the Secretary may use data from a source or sources other than that specified in subparagraph (A) that the Secretary finds to be of equivalent completeness and reliability, as reported by a State by November 30, 1997, and approved by the Secretary by March 1, 1998.

"(3) NO WAIVER OF AFCARS REQUIREMENTS.--This section shall not be construed to alter or affect any requirement of section 479 or of any regulation prescribed under such section with respect to reporting of data by States, or to waive any penalty for failure to comply with such a requirement.

"(d) ADOPTION INCENTIVE PAYMENT.--

"(1) IN GENERAL.--Except as provided in paragraph (2), the adoption incentive payment payable to a State for a fiscal year under this section shall be equal to the sum of--

"(A) $4,000, multiplied by the amount (if any) by which the number of foster child adoptions in the State during the fiscal year exceeds the base number of foster child adoptions for the State for the fiscal year; and

"(B) $2,000, multiplied by the amount (if any) by which the number of special needs adoptions in the State during the fiscal year exceeds the base number of special needs adoptions for the State for the fiscal year.

"(2) PRO RATA ADJUSTMENT IF INSUFFICIENT FUNDS AVAILABLE.--For any fiscal year, if the total amount of adoption incentive payments otherwise payable under this section for a fiscal year exceeds the amount appropriated pursuant to subsection (h) for the fiscal year, the amount of the adoption incentive payment payable to each State under this section for the fiscal year shall be--

"(A) the amount of the adoption incentive payment that would otherwise be payable to the State under this section for the fiscal year; multiplied by

"(B) the percentage represented by the amount so appropriated for the fiscal year, divided by the total amount of adoption incentive payments otherwise payable under this section for the fiscal year.

"(e) 2-YEAR AVAILABILITY OF INCENTIVE PAYMENTS.--Payments to a State under this section in a fiscal year shall remain available for use by the State through the end of the succeeding fiscal year.

"(f) LIMITATIONS ON USE OF INCENTIVE PAYMENTS.--A State shall not expend an amount paid to the State under this section except to provide to children or families any service (including post-adoption services) that may be provided under part B or E. Amounts expended by a State in accordance with the preceding sentence shall be disregarded in determining State expenditures for purposes of Federal matching payments under sections 423, 434, and 474.

"(g) DEFINITIONS.--As used in this section:

"(1) FOSTER CHILD ADOPTION.--The term 'foster child adoption' means the final adoption of a child who, at the time of adoptive placement, was in foster care under the supervision of the State.

"(2) SPECIAL NEEDS ADOPTION.--The term 'special needs adoption' means the final adoption of a child for whom an adoption assistance agreement is in effect under section 473.

"(3) BASE NUMBER OF FOSTER CHILD ADOPTIONS.--The term 'base number of foster child adoptions for a State' means--

"(A) with respect to fiscal year 1998, the average number of foster child adoptions in the State in fiscal years 1995, 1996, and 1997; and

"(B) with respect to any subsequent fiscal year, the number of

foster child adoptions in the State in the fiscal year for which the number is the greatest in the period that begins with fiscal year 1997 and ends with the fiscal year preceding such subsequent fiscal year.

"(4) BASE NUMBER OF SPECIAL NEEDS ADOPTIONS.--The term 'base number of special needs adoptions for a State' means--

"(A) with respect to fiscal year 1998, the average number of special needs adoptions in the State in fiscal years 1995, 1996, and 1997; and

"(B) with respect to any subsequent fiscal year, the number of special needs adoptions in the State in the fiscal year for which the number is the greatest in the period that begins with fiscal year 1997 and ends with the fiscal year preceding such subsequent fiscal year.

"(h) LIMITATIONS ON AUTHORIZATION OF APPROPRIATIONS.--

"(1) IN GENERAL.--For grants under subsection (a), there are authorized to be appropriated to the Secretary $20,000,000 for each of fiscal years 1999 through 2003.

"(2) AVAILABILITY.--Amounts appropriated under paragraph (1) are authorized to remain available until expended, but not after fiscal year 2003.

"(i) TECHNICAL ASSISTANCE.--

"(1) IN GENERAL.--The Secretary may, directly or through grants or contracts, provide technical assistance to assist States and local communities to reach their targets for increased numbers of adoptions and, to the extent that adoption is not possible, alternative permanent placements, for children in foster care.

"(2) DESCRIPTION OF THE CHARACTER OF THE TECHNICAL ASSISTANCE.--The technical assistance provided under paragraph (1) may support the goal of encouraging more adoptions out of the foster care system, when

adoptions promote the best interests of children, and may include the following:

"(A) The development of best practice guidelines for expediting termination of parental rights.

"(B) Models to encourage the use of concurrent planning.

"(C) The development of specialized units and expertise in moving children toward adoption as a permanency goal.

"(D) The development of risk assessment tools to facilitate early identification of the children who will be at risk of harm if returned home.

"(E) Models to encourage the fast tracking of children who have not attained 1 year of age into pre-adoptive placements.

"(F) Development of programs that place children into pre-adoptive families without waiting for termination of parental rights.

"(3) TARGETING OF TECHNICAL ASSISTANCE TO THE COURTS.--Not less than 50 percent of any amount appropriated pursuant to paragraph (4) shall be used to provide technical assistance to the courts.

"(4) LIMITATIONS ON AUTHORIZATION OF APPROPRIATIONS.--To carry out this subsection, there are authorized to be appropriated to the Secretary of Health and Human Services not to exceed $10,000,000 for each of fiscal years 1998 through 2000.".

(b) DISCRETIONARY CAP ADJUSTMENT FOR ADOPTION INCENTIVE PAYMENTS.--

(1) SECTION 251 AMENDMENT.--Section 251(b)(2) of the Balanced Budget and Emergency Deficit Control Act of 1985 (2 U.S.C. 901(b)(2)), as amended by section 10203(a)(4) of the Balanced Budget Act of 1997, is amended by adding at the end the following new subparagraph:

"(G) ADOPTION INCENTIVE PAYMENTS.--Whenever a bill or joint resolution making appropriations for fiscal year 1999, 2000, 2001, 2002, or 2003 is enacted that specifies an amount

for adoption incentive payments pursuant to this part for the Department of Health and Human Services--

"(i) the adjustments for new budget authority shall be the amounts of new budget authority provided in that measure for adoption incentive payments, but not to exceed $20,000,000; and

"(ii) the adjustment for outlays shall be the additional outlays flowing from such amount.".

(2) SECTION 314 AMENDMENT.--Section 314(b) of the Congressional Budget Act of 1974, as amended by section 10114(a) of the Balanced Budget Act of 1997, is amended--

(A) by striking "or" at the end of paragraph (4);

(B) by striking the period at the end of paragraph (5) and inserting "; or"; and

(C) by adding at the end the following:

"(6) in the case of an amount for adoption incentive payments (as defined in section 251(b)(2)(G) of the Balanced Budget and Emergency Deficit Control Act of 1985) for fiscal year 1999, 2000, 2001, 2002, or 2003 for the Department of Health and Human Services, an amount not to exceed $20,000,000.".

SEC. 202. ADOPTIONS ACROSS STATE AND COUNTY JURISDICTIONS.

(a) STATE PLAN FOR CHILD WELFARE SERVICES REQUIREMENT.--Section 422(b) of the Social Security Act (42 U.S.C. 622(b)) is amended--

(1) in paragraph (10), by striking "and" at the end;

(2) in paragraph (11), by striking the period and inserting "; and"; and

(3) by adding at the end the following:

"(12) contain assurances that the State shall develop plans for the effective use of cross-jurisdictional resources to facilitate timely adoptive or permanent placements for waiting children.".

(b) CONDITION OF ASSISTANCE.--Section 474 of such Act (42 U.S.C. 674) is amended by adding at the end the following:

"(e) Notwithstanding subsection (a), a State shall not be eligible for any payment under this section if the Secretary finds that, after the date of the enactment of this subsection, the State has--
"(1) denied or delayed the placement of a child for adoption when an approved family is available outside of the jurisdiction with responsibility for handling the case of the child; or
"(2) failed to grant an opportunity for a fair hearing, as described in section 471(a)(12), to an individual whose allegation of a violation of paragraph (1) of this subsection is denied by the State or not acted upon by the State with reasonable promptness.".
(c) STUDY OF INTERJURISDICTIONAL ADOPTION ISSUES.--
(1) IN GENERAL.--The Comptroller General of the United States shall--
(A) study and consider how to improve procedures and policies to facilitate the timely and permanent adoptions of children across State and county jurisdictions; and
(B) examine, at a minimum, interjurisdictional adoption issues--
(i) concerning the recruitment of prospective adoptive families from other States and counties;
(ii) concerning the procedures to grant reciprocity to prospective adoptive family home studies from other States and counties;
(iii) arising from a review of the comity and full faith and credit provided to adoption decrees and termination of parental rights orders from other States; and
(iv) concerning the procedures related to the administration and implementation of the Interstate Compact on the Placement of Children.
(2) REPORT TO THE CONGRESS.--Not later than 1 year after the date of the enactment of this Act, the Comptroller General shall submit to the appropriate committees of the

Congress a report that includes--
(A) the results of the study conducted under paragraph (1); and
(B) recommendations on how to improve procedures to facilitate the interjurisdictional adoption of children, including interstate and intercounty adoptions, so that children will be assured timely and permanent placements.
SEC. 203. PERFORMANCE OF STATES IN PROTECTING CHILDREN.
(a) ANNUAL REPORT ON STATE PERFORMANCE.--Part E of title IV of the Social Security Act (42 U.S.C. 670 et seq.) is amended by adding at the end the following:
"SEC. 479A. ANNUAL REPORT.
"The Secretary, in consultation with Governors, State legislatures, State and local public officials responsible for administering child welfare programs, and child welfare advocates, shall--
"(1) develop a set of outcome measures (including length of stay in foster care, number of foster care placements, and number of adoptions) that can be used to assess the performance of States in operating child protection and child welfare programs pursuant to parts B and E to ensure the safety of children;
"(2) to the maximum extent possible, the outcome measures should be developed from data available from the Adoption and Foster Care Analysis and Reporting System;
"(3) develop a system for rating the performance of States with respect to the outcome measures, and provide to the States an explanation of the rating system and how scores are determined under the rating system;
"(4) prescribe such regulations as may be necessary to ensure that States provide to the Secretary the data necessary to determine State performance with respect to each outcome measure, as a condition of the State receiving funds under this part; and

"(5) on May 1, 1999, and annually thereafter, prepare and submit to the Congress a report on the performance of each State on each outcome measure, which shall examine the reasons for high performance and low performance and, where possible, make recommendations as to how State performance could be improved.".

(b) DEVELOPMENT OF PERFORMANCE-BASED INCENTIVE SYSTEM.--The Secretary of Health and Human Services, in consultation with State and local public officials responsible for administering child welfare programs and child welfare advocates, shall study, develop, and recommend to Congress an incentive system to provide payments under parts B and E of title IV of the Social Security Act (42 U.S.C. 620 et seq., 670 et seq.) to any State based on the State's performance under such a system. Such a system shall, to the extent the Secretary determines feasible and appropriate, be based on the annual report required by section 479A of the Social Security Act (as added by subsection (a) of this section) or on any proposed modifications of the annual report. Not later than 6 months after the date of the enactment of this Act, the Secretary shall submit to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate a progress report on the feasibility, timetable, and consultation process for conducting such a study. Not later than 15 months after such date of enactment, the Secretary shall submit to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate the final report on a performance- based incentive system. The report may include other recommendations for restructuring the program and payments under parts B and E of title IV of the Social Security Act.

TITLE III--ADDITIONAL IMPROVEMENTS AND REFORMS

SEC. 301. EXPANSION OF CHILD WELFARE

DEMONSTRATION PROJECTS.

(a) IN GENERAL.--Section 1130(a) of the Social Security Act (42 U.S.C. 1320a- 9) is amended to read as follows:

"(a) AUTHORITY TO APPROVE DEMONSTRATION PROJECTS.--

"(1) IN GENERAL.--The Secretary may authorize States to conduct demonstration projects pursuant to this section which the Secretary finds are likely to promote the objectives of part B or E of title IV.

"(2) LIMITATION.--The Secretary may authorize not more than 10 demonstration projects under paragraph (1) in each of fiscal years 1998 through 2002.

"(3) CERTAIN TYPES OF PROPOSALS REQUIRED TO BE CONSIDERED.--

"(A) If an appropriate application therefor is submitted, the Secretary shall consider authorizing a demonstration project which is designed to identify and address barriers that result in delays to adoptive placements for children in foster care.

"(B) If an appropriate application therefor is submitted, the Secretary shall consider authorizing a demonstration project which is designed to identify and address parental substance abuse problems that endanger children and result in the placement of children in foster care, including through the placement of children with their parents in residential treatment facilities (including residential treatment facilities for post-partum depression) that are specifically designed to serve parents and children together in order to promote family reunification and that can ensure the health and safety of the children in such placements.

"(C) If an appropriate application therefor is submitted, the Secretary shall consider authorizing a demonstration project which is designed to address kinship care.

"(4) LIMITATION ON ELIGIBILITY.--The Secretary may not authorize a State to conduct a demonstration project under this

section if the State fails to provide health insurance coverage to any child with special needs (as determined under section 473(c)) for whom there is in effect an adoption assistance agreement between a State and an adoptive parent or parents.
"(5) REQUIREMENT TO CONSIDER EFFECT OF PROJECT ON TERMS AND CONDITIONS OF CERTAIN COURT ORDERS.--In considering an application to conduct a demonstration project under this section that has been submitted by a State in which there is in effect a court order determining that the State's child welfare program has failed to comply with the provisions of part B or E of title IV, or with the Constitution of the United States, the Secretary shall take into consideration the effect of approving the proposed project on the terms and conditions of the court order related to the failure to comply.".
(b) RULE OF CONSTRUCTION.--Nothing in the amendment made by subsection (a) shall be construed as affecting the terms and conditions of any demonstration project approved under section 1130 of the Social Security Act (42 U.S.C. 1320a-9) before the date of the enactment of this Act.
(c) AUTHORITY TO EXTEND DURATION OF DEMONSTRATIONS.--Section 1130(d) of such Act (42 U.S.C. 1320a-9(d)) is amended by inserting ", unless in the judgment of the Secretary, the demonstration project should be allowed to continue" before the period.
SEC. 302. PERMANENCY HEARINGS.
Section 475(5)(C) of the Social Security Act (42 U.S.C. 675(5)(C)) is amended--
(1) by striking "dispositional" and inserting "permanency";
(2) by striking "eighteen" and inserting "12";
(3) by striking "original placement" and inserting "date the child is considered to have entered foster care (as determined under subparagraph (F))"; and
(4) by striking "future status of" and all that follows through

"long term basis)" and inserting "permanency plan for the child that includes whether, and if applicable when, the child will be returned to the parent, placed for adoption and the State will file a petition for termination of parental rights, or referred for legal guardianship, or (in cases where the State agency has documented to the State court a compelling reason for determining that it would not be in the best interests of the child to return home, be referred for termination of parental rights, or be placed for adoption, with a fit and willing relative, or with a legal guardian) placed in another planned permanent living arrangement".

SEC. 303. KINSHIP CARE.

(a) REPORT.--

(1) IN GENERAL.--The Secretary of Health and Human Services shall--

(A) not later than June 1, 1998, convene the advisory panel provided for in subsection (b)(1) and prepare and submit to the advisory panel an initial report on the extent to which children in foster care are placed in the care of a relative (in this section referred to as "kinship care"); and

(B) not later than June 1, 1999, submit to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate a final report on the matter described in subparagraph (A), which shall--

(i) be based on the comments submitted by the advisory panel pursuant to subsection (b)(2) and other information and considerations; and

(ii) include the policy recommendations of the Secretary with respect to the matter.

(2) REQUIRED CONTENTS.--Each report required by paragraph (1) shall--

(A) include, to the extent available for each State, information on--

(i) the policy of the State regarding kinship care;

(ii) the characteristics of the kinship care providers (including age, income, ethnicity, and race, and the relationship of the kinship care providers to the children);
(iii) the characteristics of the household of such providers (such as number of other persons in the household and family composition);
(iv) how much access to the child is afforded to the parent from whom the child has been removed;
(v) the cost of, and source of funds for, kinship care (including any subsidies such as medicaid and cash assistance);
(vi) the permanency plan for the child and the actions being taken by the State to achieve the plan;
(vii) the services being provided to the parent from whom the child has been removed; and
(viii) the services being provided to the kinship care provider; and
(B) specifically note the circumstances or conditions under which children enter kinship care.
(b) ADVISORY PANEL.--
(1) ESTABLISHMENT.--The Secretary of Health and Human Services, in consultation with the Chairman of the Committee on Ways and Means of the House of Representatives and the Chairman of the Committee on Finance of the Senate, shall convene an advisory panel which shall include parents, foster parents, relative caregivers, former foster children, State and local public officials responsible for administering child welfare programs, private persons involved in the delivery of child welfare services, representatives of tribal governments and tribal courts, judges, and academic experts.
(2) DUTIES.--The advisory panel convened pursuant to paragraph (1) shall review the report prepared pursuant to subsection (a), and, not later than October 1, 1998, submit to the Secretary comments on the report.
SEC. 304. CLARIFICATION OF ELIGIBLE POPULATION

FOR INDEPENDENT LIVING SERVICES.

Section 477(a)(2)(A) of the Social Security Act (42 U.S.C. 677(a)(2)(A)) is amended by inserting "(including children with respect to whom such payments are no longer being made because the child has accumulated assets, not to exceed $5,000, which are otherwise regarded as resources for purposes of determining eligibility for benefits under this part)" before the comma.

SEC. 305. REAUTHORIZATION AND EXPANSION OF FAMILY PRESERVATION AND SUPPORT SERVICES.

(a) REAUTHORIZATION OF FAMILY PRESERVATION AND SUPPORT SERVICES.--

(1) IN GENERAL.--Section 430(b) of the Social Security Act (42 U.S.C. 629(b)) is amended--

(A) in paragraph (4), by striking "or" at the end;

(B) in paragraph (5), by striking the period and inserting a semicolon; and

(C) by adding at the end the following:

"(6) for fiscal year 1999, $275,000,000;

"(7) for fiscal year 2000, $295,000,000; and

"(8) for fiscal year 2001, $305,000,000.".

(2) CONTINUATION OF RESERVATION OF CERTAIN AMOUNTS.--Paragraphs (1) and (2) of section 430(d) of the Social Security Act (42 U.S.C. 629(d)(1) and (2)) are each amended by striking "and 1998" and inserting "1998, 1999, 2000, and 2001".

(3) CONFORMING AMENDMENTS.--Section 13712 of the Omnibus Budget Reconciliation Act of 1993 (42 U.S.C. 670 note) is amended--

(A) in subsection (c), by striking "1998" each place it appears and inserting "2001"; and

(B) in subsection (d)(2), by striking "and 1998" and inserting "1998, 1999, 2000, and 2001".

(b) EXPANSION FOR TIME-LIMITED FAMILY

REUNIFICATION SERVICES AND ADOPTION PROMOTION AND SUPPORT SERVICES.--

(1) ADDITIONS TO STATE PLAN.--Section 432 of the Social Security Act (42 U.S.C. 629b) is amended--

(A) in subsection (a)--

(i) in paragraph (4), by striking "and community-based family support services" and inserting ", community-based family support services, time- limited family reunification services, and adoption promotion and support services,"; and

(ii) in paragraph (5)(A), by striking "and community-based family support services" and inserting ", community-based family support services, time- limited family reunification services, and adoption promotion and support services"; and

(B) in subsection (b)(1), by striking "and family support" and inserting ", family support, time-limited family reunification, and adoption promotion and support".

(2) DEFINITIONS OF TIME-LIMITED FAMILY REUNIFICATION SERVICES AND ADOPTION PROMOTION AND SUPPORT SERVICES.--Section 431(a) of the Social Security Act (42 U.S.C. 629a(a)) is amended by adding at the end the following:

"(7) TIME-LIMITED FAMILY REUNIFICATION SERVICES.--

"(A) IN GENERAL.--The term 'time-limited family reunification services' means the services and activities described in subparagraph (B) that are provided to a child that is removed from the child's home and placed in a foster family home or a child care institution and to the parents or primary caregiver of such a child, in order to facilitate the reunification of the child safely and appropriately within a timely fashion, but only during the 15-month period that begins on the date that the child, pursuant to section 475(5)(F), is considered to have entered foster care.

"(B) SERVICES AND ACTIVITIES DESCRIBED.--The

services and activities described in this subparagraph are the following:

"(i) Individual, group, and family counseling.

"(ii) Inpatient, residential, or outpatient substance abuse treatment services.

"(iii) Mental health services.

"(iv) Assistance to address domestic violence.

"(v) Services designed to provide temporary child care and therapeutic services for families, including crisis nurseries.

"(vi) Transportation to or from any of the services and activities described in this subparagraph.

"(8) ADOPTION PROMOTION AND SUPPORT SERVICES.--The term 'adoption promotion and support services' means services and activities designed to encourage more adoptions out of the foster care system, when adoptions promote the best interests of children, including such activities as pre- and post-adoptive services and activities designed to expedite the adoption process and support adoptive families.".

(3) ADDITIONAL CONFORMING AMENDMENTS.--

(A) PURPOSES.--Section 430(a) of the Social Security Act (42 U.S.C. 629(a)) is amended by striking "and community-based family support services" and inserting ", community-based family support services, time-limited family reunification services, and adoption promotion and support services".

(B) PROGRAM TITLE.--The heading of subpart 2 of part B of title IV of the Social Security Act (42 U.S.C. 629 et seq.) is amended to read as follows:

"Subpart 2--Promoting Safe and Stable Families".

(c) EMPHASIZING THE SAFETY OF THE CHILD.--

(1) REQUIRING ASSURANCES THAT THE SAFETY OF CHILDREN SHALL BE OF PARAMOUNT CONCERN.--Section 432(a) of the Social Security Act (42 U.S.C. 629b(a)) is amended--

(A) by striking "and" at the end of paragraph (7);

(B) by striking the period at the end of paragraph (8); and
(C) by adding at the end the following:
"(9) contains assurances that in administering and conducting service programs under the plan, the safety of the children to be served shall be of paramount concern.".
(2) DEFINITIONS OF FAMILY PRESERVATION AND FAMILY SUPPORT SERVICES.--Section 431(a) of the Social Security Act (42 U.S.C. 629a(a)) is amended--
(A) in paragraph (1)--
(i) in subparagraph (A), by inserting "safe and" before "appropriate" each place it appears; and
(ii) in subparagraph (B), by inserting "safely" after "remain"; and
(B) in paragraph (2)--
(i) by inserting "safety and" before "well-being"; and
(ii) by striking "stable" and inserting "safe, stable,".
(d) CLARIFICATION OF MAINTENANCE OF EFFORT REQUIREMENT.--
(1) DEFINITION OF NON-FEDERAL FUNDS.--Section 431(a) of the Social Security Act (42 U.S.C. 629a(a)), as amended by subsection (b)(2), is amended by adding at the end the following:
"(9) NON-FEDERAL FUNDS.--The term 'non-Federal funds' means State funds, or at the option of a State, State and local funds.".
(2) EFFECTIVE DATE.--The amendment made by paragraph (1) takes effect as if included in the enactment of section 13711 of the Omnibus Budget Reconciliation Act of 1993 (Public Law 103-33; 107 Stat. 649).
SEC. 306. HEALTH INSURANCE COVERAGE FOR CHILDREN WITH SPECIAL NEEDS.
Section 471(a) of the Social Security Act (42 U.S.C. 671(a)), as amended by section 106, is amended--
(1) in paragraph (19), by striking "and" at the end;

(2) in paragraph (20), by striking the period and inserting "; and"; and

(3) by adding at the end the following:

"(21) provides for health insurance coverage (including, at State option, through the program under the State plan approved under title XIX) for any child who has been determined to be a child with special needs, for whom there is in effect an adoption assistance agreement (other than an agreement under this part) between the State and an adoptive parent or parents, and who the State has determined cannot be placed with an adoptive parent or parents without medical assistance because such child has special needs for medical, mental health, or rehabilitative care, and that with respect to the provision of such health insurance coverage--

"(A) such coverage may be provided through 1 or more State medical assistance programs;

"(B) the State, in providing such coverage, shall ensure that the medical benefits, including mental health benefits, provided are of the same type and kind as those that would be provided for children by the State under title XIX;

"(C) in the event that the State provides such coverage through a State medical assistance program other than the program under title XIX, and the State exceeds its funding for services under such other program, any such child shall be deemed to be receiving aid or assistance under the State plan under this part for purposes of section 1902(a)(10)(A)(i)(I); and

"(D) in determining cost-sharing requirements, the State shall take into consideration the circumstances of the adopting parent or parents and the needs of the child being adopted consistent, to the extent coverage is provided through a State medical assistance program, with the rules under such program.".

SEC. 307. CONTINUATION OF ELIGIBILITY FOR ADOPTION ASSISTANCE PAYMENTS ON BEHALF OF CHILDREN WITH SPECIAL NEEDS WHOSE INITIAL

ADOPTION HAS BEEN DISSOLVED.

(a) CONTINUATION OF ELIGIBILITY.--Section 473(a)(2) of the Social Security Act (42 U.S.C. 673(a)(2)) is amended by adding at the end the following: "Any child who meets the requirements of subparagraph (C), who was determined eligible for adoption assistance payments under this part with respect to a prior adoption, who is available for adoption because the prior adoption has been dissolved and the parental rights of the adoptive parents have been terminated or because the child's adoptive parents have died, and who fails to meet the requirements of subparagraphs (A) and (B) but would meet such requirements if the child were treated as if the child were in the same financial and other circumstances the child was in the last time the child was determined eligible for adoption assistance payments under this part and the prior adoption were treated as never having occurred, shall be treated as meeting the requirements of this paragraph for purposes of paragraph (1)(B)(ii).".

(b) APPLICABILITY.--The amendment made by subsection (a) shall only apply to children who are adopted on or after October 1, 1997.

SEC. 308. STATE STANDARDS TO ENSURE QUALITY SERVICES FOR CHILDREN IN FOSTER CARE.

Section 471(a) of the Social Security Act (42 U.S.C. 671(a)), as amended by sections 106 and 306, is amended--

(1) in paragraph (20), by striking "and" at the end;

(2) in paragraph (21), by striking the period and inserting "; and"; and

(3) by adding at the end the following:

"(22) provides that, not later than January 1, 1999, the State shall develop and implement standards to ensure that children in foster care placements in public or private agencies are provided quality services that protect the safety and health of the children.".

TITLE IV--MISCELLANEOUS

SEC. 401. PRESERVATION OF REASONABLE PARENTING.

Nothing in this Act is intended to disrupt the family unnecessarily or to intrude inappropriately into family life, to prohibit the use of reasonable methods of parental discipline, or to prescribe a particular method of parenting.

SEC. 402. REPORTING REQUIREMENTS.

Any information required to be reported under this Act shall be supplied to the Secretary of Health and Human Services through data meeting the requirements of the Adoption and Foster Care Analysis and Reporting System established pursuant to section 479 of the Social Security Act (42 U.S.C. 679), to the extent such data is available under that system. The Secretary shall make such modifications to regulations issued under section 479 of such Act with respect to the Adoption and Foster Care Analysis and Reporting System as may be necessary to allow States to obtain data that meets the requirements of such system in order to satisfy the reporting requirements of this Act.

SEC. 403. SENSE OF CONGRESS REGARDING STANDBY GUARDIANSHIP.

It is the sense of Congress that the States should have in effect laws and procedures that permit any parent who is chronically ill or near death, without surrendering parental rights, to designate a standby guardian for the parent's minor children, whose authority would take effect upon--

(1) the death of the parent;

(2) the mental incapacity of the parent; or

(3) the physical debilitation and consent of the parent.

SEC. 404. TEMPORARY ADJUSTMENT OF CONTINGENCY FUND FOR STATE WELFARE PROGRAMS.

(a) REDUCTION OF APPROPRIATION.--Section 403(b)(2)

of the Social Security Act (42 U.S.C. 603(b)(2)) is amended by inserting ", reduced by the sum of the dollar amounts specified in paragraph (6)(C)(ii)" before the period.

(b) INCREASE IN STATE REMITTANCES.--Section 403(b)(6) of such Act (42 U.S.C. 603(b)(6)) is amended by adding at the end the following:

"(C) ADJUSTMENT OF STATE REMITTANCES.--

"(i) IN GENERAL.--The amount otherwise required by subparagraph (A) to be remitted by a State for a fiscal year shall be increased by the lesser of--

"(I) the total adjustment for the fiscal year, multiplied by the adjustment percentage for the State for the fiscal year; or

"(II) the unadjusted net payment to the State for the fiscal year.

"(ii) TOTAL ADJUSTMENT.--As used in clause (i), the term 'total adjustment' means--

"(I) in the case of fiscal year 1998, $2,000,000;

"(II) in the case of fiscal year 1999, $9,000,000;

"(III) in the case of fiscal year 2000, $16,000,000; and

"(IV) in the case of fiscal year 2001, $13,000,000.

"(iii) ADJUSTMENT PERCENTAGE.--As used in clause (i), the term 'adjustment percentage' means, with respect to a State and a fiscal year--

"(I) the unadjusted net payment to the State for the fiscal year; divided by

"(II) the sum of the unadjusted net payments to all States for the fiscal year.

"(iv) UNADJUSTED NET PAYMENT.--As used in this subparagraph, the term, 'unadjusted net payment' means with respect to a State and a fiscal year--

"(I) the total amount paid to the State under paragraph (3) in the fiscal year; minus

"(II) the amount that, in the absence of this subparagraph, would be required by subparagraph (A) or by section 409(a)(10) to be remitted by the State in respect of the payment.".

(c) RECOMMENDATIONS FOR IMPROVING THE OPERATION OF THE CONTINGENCY FUND.--Not later than March 1, 1998, the Secretary of Health and Human Services shall make recommendations to the Congress for improving the operation of the Contingency Fund for State Welfare Programs.

SEC. 405. COORDINATION OF SUBSTANCE ABUSE AND CHILD PROTECTION SERVICES.

Within 1 year after the date of the enactment of this Act, the Secretary of Health and Human Services, based on information from the Substance Abuse and Mental Health Services Administration and the Administration for Children and Families in the Department of Health of Human Services, shall prepare and submit to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate a report which describes the extent and scope of the problem of substance abuse in the child welfare population, the types of services provided to such population, and the outcomes resulting from the provision of such services to such population. The report shall include recommendations for any legislation that may be needed to improve coordination in providing such services to such population.

SEC. 406. PURCHASE OF AMERICAN-MADE EQUIPMENT AND PRODUCTS.

(a) IN GENERAL.--It is the sense of the Congress that, to the greatest extent practicable, all equipment and products purchased with funds made available under this Act should be American-made.

(b) NOTICE REQUIREMENT.--In providing financial assistance to, or entering into any contract with, any entity using funds made available under this Act, the head of each Federal agency, to the greatest extent practicable, shall provide to such entity a notice describing the statement made in subsection (a) by the Congress.

TITLE V--EFFECTIVE DATE

SEC. 501. EFFECTIVE DATE.

(a) IN GENERAL.--Except as otherwise provided in this Act, the amendments made by this Act take effect on the date of enactment of this Act.

(b) DELAY PERMITTED IF STATE LEGISLATION REQUIRED.--In the case of a State plan under part B or E of title IV of the Social Security Act which the Secretary of Health and Human Services determines requires State legislation (other than legislation appropriating funds) in order for the plan to meet the additional requirements imposed by the amendments made by this Act, the State plan shall not be regarded as failing to comply with the requirements of such part solely on the basis of the failure of the plan to meet such additional requirements before the first day of the first calendar quarter beginning after the close of the first regular session of the State legislature that begins after the date of enactment of this Act. For purposes of the previous sentence, in the case of a State that has a 2-year legislative session, each year of such session shall be deemed to be a separate regular session of the State legislature.

Approved November 19, 1997.

PL 105-89, 1997 HR 867

NORTH DAKOTA CENTURY CODE, CHAPTER 27-20, UNIFORM JUVENILE COURT ACT

27-20-01. Interpretation. This chapter must be construed to effectuate the following public purposes:
1. To provide for the care, protection, and wholesome moral, mental, and physical development of children coming within its provisions;
2. Consistent with the protection of the public interest, to remove from children committing delinquent acts the taint of criminality and the consequences of criminal behavior and to substitute therefor a program of treatment, training, and rehabilitation;
3. To achieve the foregoing purposes in a family environment whenever possible, separating the child from his parents only when necessary for his welfare or in the interest of public safety;
4. To provide a simple judicial procedure through which this chapter is executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced; and
5. To provide simple interstate procedures which permit resort to cooperative measures among the juvenile courts of the several states when required to effectuate the purposes of this chapter.

27-20-02. Definitions. As used in this chapter:
1. "Abandon" means:
a. As to a parent of a child not in the custody of that parent, failure by the noncustodial parent significantly without justifiable cause:
(1) To communicate with the child; or
(2) To provide for the care and support of the child as required by law; or

b. As to a parent of a child in that parent's custody:
(1) To leave the child for an indefinite period without making firm and agreed plans, with the child's immediate caregiver, for the parent's resumption of physical custody;
(2) Following the child's birth or treatment at a hospital, to fail to arrange for the child's discharge within ten days after the child no longer requires hospital care; or
(3) To willfully fail to furnish food, shelter, clothing, or medical attention reasonably sufficient to meet the child's needs.
2. "Abandoned infant" means a child who has been abandoned before reaching the age of one year.
3. "Aggravated circumstances" means circumstances in which a parent:
a. Abandons, tortures, chronically abuses, or sexually abuses a child;
b. Fails to make substantial, meaningful efforts to secure treatment for the parent's addiction, mental illness, behavior disorder, or any combination of those conditions for a period equal to the lesser of:
(1) One year; or
(2) One-half of the child's lifetime, measured in days, as of the date a petition alleging aggravated circumstances is filed;
c. Engages in conduct prohibited under sections 12.1-20-01 through 12.1-20-08 or chapter 12.1-27.2, in which a child is the victim or intended victim;
d. Engages in conduct that constitutes one of the following crimes, or of an offense under the laws of another jurisdiction which requires proof of substantially similar elements:
(1) A violation of section 12.1-16-01, 12.1-16-02, or 12.1-16-03, or subdivision a of subsection 1 of section 14-09-22;
(2) Aiding, abetting, attempting, conspiring, or soliciting a violation of section 12.1-16-01, 12.1-16-02, or 12.1-16-03; or
(3) A violation of section 12.1-17-02 in which the victim has

suffered serious bodily injury;
e. Engages or attempts to engage in conduct, prohibited under sections 12.1-17-01 through 12.1-17-04, in which a child is the victim or intended victim; or
f. Has been incarcerated under a sentence for which the latest release date is:
(1) In the case of a child age nine or older, after the child's majority; or
(2) In the case of a child, after the child is twice the child's current age, measured in days.
4. "Child" means an individual who is:
a. Under the age of eighteen years and is neither married and cohabiting with spouse nor in the military service of the United States; or
b. Under the age of twenty years with respect to a delinquent act committed while under the age of eighteen years.
5. "Custodian" means a person, other than a parent or legal guardian, who stands in loco parentis to the child or a person to whom legal custody of the child has been given by order of a court.
6. "Delinquent act" means an act designated a crime under the law, including local ordinances or resolutions of this state, or of another state if the act occurred in that state, or under federal law, and the crime does not fall under subdivision c of subsection 18 and is not a traffic offense as defined in subsection 17.
7. "Delinquent child" means a child who has committed a delinquent act and is in need of treatment or rehabilitation.
8. "Deprived child" means a child who:
a. Is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for the child's physical, mental, or emotional health, or morals, and the deprivation is not due primarily to the lack of financial means of the child's parents, guardian, or other custodian;

b. Has been placed for care or adoption in violation of law;
c. Has been abandoned by the child's parents, guardian, or other custodian;
d. Is without proper parental care, control, or education as required by law, or other care and control necessary for the child's well-being because of the physical, mental, emotional, or other illness or disability of the child's parent or parents, and that such lack of care is not due to a willful act of commission or act of omission by the child's parents, and care is requested by a parent;
e. Is in need of treatment and whose parents, guardian, or other custodian have refused to participate in treatment as ordered by the juvenile court;
f. Was subject to prenatal exposure to chronic and severe use of alcohol or any controlled substance as defined in chapter 19-03.1 in a manner not lawfully prescribed by a practitioner; or
g. Is present in an environment subjecting the child to exposure to a controlled substance, chemical substance, or drug paraphernalia as prohibited by section 19-03.1-22.2.
9. "Detention" means a physically secure facility with locked doors and does not include shelter care, attendant care, or home detention.
10. "Fit and willing relative or other appropriate individual" means a relative or other individual who has been determined, after consideration of an assessment that includes a criminal history record investigation under chapter 50-11.3, to be a qualified person under chapter 30.1-27, and who consents in writing to act as a legal guardian.
11. "Home" when used in the phrase "to return home" means the abode of the child's parent with whom the child formerly resided.
12. "Juvenile court" means the district court of this state.
13. "Permanency hearing" means a hearing, conducted with

respect to a child who is in foster care, to determine the permanency plan for the child which includes:

a. Whether and, if applicable, when the child will be returned to the parent;

b. Whether and, if applicable, when the child will be placed for adoption and the state will file a petition for termination of parental rights;

c. Whether and, if applicable, when a fit and willing relative or other appropriate individual will be appointed as a legal guardian;

d. In cases in which a compelling reason has been shown that it would not be in the child's best interests to return home, to have parental rights terminated, to be placed for adoption, to be placed with a fit and willing relative, or to be placed with a legal guardian, whether and, if applicable, when the child will be placed in another planned permanent living arrangement;

e. In the case of a child who has been placed in foster care outside the state in which the home of the parents is located, or if the parents maintain separate homes, outside the state in which the home of the parent who was the child's primary caregiver is located, whether the out-of-state placement continues to be appropriate and in the child's best interests; and

f. In the case of a child who has attained age sixteen, the services needed to assist the child to make the transition from foster care to independent living.

14. "Protective supervision" means supervision ordered by the court of children found to be deprived or unruly.

15. "Relative" means:

a. The child's grandparent, great-grandparent, sibling, half-sibling, aunt, great-aunt, uncle, great-uncle, nephew, niece, or first cousin;

b. An individual with a relationship to the child, derived through a current or former spouse of the child's parent, similar to a relationship described in subdivision a;

c. An individual recognized in the child's community as having a relationship with the child similar to a relationship described in subdivision a; or

d. The child's stepparent.

16. "Shelter care" means temporary care of a child in physically unrestricted facilities.

17. "Traffic offense" means a violation of a law or local ordinance or resolution governing the operation of a vehicle upon the highways of this state, or the waterways within or adjoining this state, by a child who has been issued a valid operator's license or permit if one is required, other than manslaughter resulting from the operation of a motor vehicle in violation of section 12.1-16-02; negligent homicide in violation of section 12.1-16-03; and driving or being in actual physical control of a vehicle in violation of section 39-08-01, or an equivalent ordinance.

18. "Unruly child" means a child who:

a. Is habitually and without justification truant from school;

b. Is habitually disobedient of the reasonable and lawful commands of the child's parent, guardian, or other custodian and is ungovernable; or who is willfully in a situation dangerous or injurious to the health, safety, or morals of the child or others;

c. Has committed an offense applicable only to a child, except for an offense committed by a minor fourteen years of age or older under subsection 2 of section 12.1-31-03 or an equivalent local ordinance or resolution;

d. Has committed a noncriminal traffic offense without ever having been issued an operator's license or permit if one was required;

e. Has committed an offense in violation of section 39-08-18 or 5-01-08; or

f. Is under the age of fourteen years and has purchased, possessed, smoked, or used tobacco or tobacco-related products

in violation of subsection 2 of section 12.1-31-03; and
g. In any of the foregoing instances is in need of treatment or rehabilitation.
19. "Willfully" has the meaning provided in section 12.1-02-02.

27-20-03. Jurisdiction.
1. The juvenile court has exclusive original jurisdiction of the following proceedings, which are governed by this chapter:
a. Proceedings in which a child is alleged to be delinquent, unruly, or deprived;
b. Proceedings for the termination of parental rights except when a part of an adoption proceeding; and
c. Proceedings arising under sections 27-20-39 through 27-20-42.
2. The juvenile court also has exclusive original jurisdiction of the following proceedings, which are governed by the laws relating thereto without regard to the other provisions of this chapter:
a. Proceedings to obtain judicial consent to the marriage, employment, or enlistment in the armed services of a child, if consent is required by law;
b. Proceedings under the interstate compact on juveniles;
c. Proceedings under the interstate compact on the placement of children; and
d. Proceedings arising under section 50-06-06.13 to obtain a judicial determination that the placement of a severely emotionally disturbed child in an out-of-home treatment program is in the best interests of the child.
3. The juvenile court has concurrent jurisdiction with the district court of proceedings for the appointment of a guardian for a minor which, if originated under this chapter, are governed by this chapter and chapter 30.1-27.

27-20-04. Concurrent jurisdiction. Repealed by S.L. 1991, ch.

326, § 203.

27-20-05. Juvenile court personnel.
1. The supreme court may provide for the appointment by administrative and personnel rules of the necessary juvenile court officers, clerical personnel, and other specialized personnel within the limits of legislative appropriations to assist the court in carrying out its juvenile probation and supervisor functions.
2. Detention center facilities and personnel must be funded by the county.
3. All salaries, per diem, and other compensation payable to juvenile court personnel, all necessary books, forms, stationery, office supplies and equipment, postage, telephone, travel, and other necessary expenses incurred in carrying out the provisions of this chapter must be borne by the state, except for suitable quarters for conducting official business and lights and fuel which must be funded by the county and except as provided by subsection 1 of section 27-20-49.

27-20-05.1. County juvenile supervisors - Authorization for mill levy. Repealed by S.L. 1981, ch. 320, § 112.

27-20-06. Powers and duties of juvenile supervisors.
1. For the purpose of carrying out the objectives and purposes of this chapter and subject to the limitations of this chapter or imposed by the court, a juvenile supervisor shall:
a. Make investigations, reports, and recommendations to the juvenile court.
b. Receive and examine complaints and charges of delinquency, unruly conduct, or deprivation of a child for the purpose of considering the commencement of proceedings under this chapter.
c. Supervise and assist a child placed on probation or in the

juvenile supervisor's protection, supervision, or care by order of the court or other authority of law.

d. Make appropriate referrals to other private or public agencies of the community if their assistance appears to be needed or desirable.

e. Take into custody and detain a child who is under the juvenile supervisor's supervision or care as a delinquent, unruly, or deprived child if the juvenile supervisor has reasonable cause to believe that the child's health or safety is in imminent danger, or that the child may abscond or be removed from the jurisdiction of the court, or when ordered by the court pursuant to this chapter.

Except as provided by this chapter, a juvenile supervisor does not have the powers of a law enforcement officer. The juvenile supervisor may not conduct accusatory proceedings under this chapter against a child who is or may be under the juvenile supervisor's care or supervision.

f. Administer oaths.

g. Take acknowledgments of instruments for the purpose of this chapter.

h. Make such temporary order not to exceed ninety-six hours for the custody and control of a child alleged to be deprived as may be deemed appropriate. The order must be reduced to writing within twenty-four hours, excluding holidays and weekends.

i. Perform all other functions designated by this chapter or under section 27-05-30 or by order of the court pursuant thereto, including, if qualified, those of a referee.

j. Perform such functions relating to domestic relations matters as directed by juvenile supervisor's appointing district judge, acting in accordance with section 27-05-29.

2. Any of the foregoing functions may be performed in another state if authorized by the court of this state and permitted by the laws of the other state.

27-20-07. Referees. Repealed by S.L. 1985, ch. 334, § 5.

27-20-08. Commencement of proceedings. A proceeding under this chapter may be commenced:
1. By transfer of a case from another court as provided in section 27-20-09;
2. By the court accepting jurisdiction as provided in section 27-20-40 or accepting supervision of a child as provided in section 27-20-42; or
3. In other cases by the filing of a petition as provided in this chapter. The petition and all other documents in the proceeding must be entitled "In the interest of _____, a child". If a child is in shelter care, the petition must be filed within thirty days of the shelter care hearing under section 27-20-17. If the petition is not filed, the child must be released from shelter care.

27-20-09. Transfer from other courts. If it appears to the court in a criminal proceeding, except for an offense transferred under section 27-20-34, that the defendant is a child subject to the jurisdiction of the juvenile court, the court shall immediately transfer the case to the juvenile court together with a copy of the accusatory pleading and other papers, documents, and transcripts of testimony relating to the case. It shall order that the defendant be taken immediately to the juvenile court or to a place of detention designated by the juvenile court, or release the defendant to the custody of the defendant's parent, guardian, custodian, or other person legally responsible for the defendant, to be brought before the juvenile court at a time designated by that court. The accusatory pleading may serve in lieu of a petition in the juvenile court unless that court directs the filing of a petition.

27-20-10. Informal adjustment.

1. Before a petition is filed, the juvenile supervisor or other officer of the court designated by it, subject to its direction, may give counsel and advice to the parties and impose conditions for the conduct and control of the child with a view to an informal adjustment if it appears:
a. The admitted facts bring the case within the jurisdiction of the court;
b. Counsel, advice and conditions, if any, for the conduct and control of the child without an adjudication would be in the best interest of the public and the child; and
c. The child and the child's parents, guardian, or other custodian consent thereto with knowledge that consent is not obligatory.
2. The giving of counsel and advice and any conditions imposed for the conduct and control of the child cannot extend beyond nine months from the day commenced unless extended by the court for an additional period not to exceed six months and does not authorize the detention of the child if not otherwise permitted by this chapter. If the child admits to driving or being in actual physical control of a vehicle in violation of section 39-08-01 or an equivalent ordinance, the child may be required to pay a fine as a condition imposed under this section.
3. An incriminating statement made by a participant to the person giving counsel or advice and in the discussions or conferences incident thereto may not be used against the declarant over objection in any hearing except in a hearing on disposition in a juvenile court proceeding or in a criminal proceeding against the declarant after conviction for the purpose of a presentence investigation.

27-20-11. Venue. A proceeding under this chapter may be commenced in the county in which the child resides. If delinquent or unruly conduct is alleged, the proceeding may be commenced in the county in which the acts constituting the

alleged delinquent or unruly conduct occurred. If deprivation is alleged, the proceeding may be brought in the county in which the child is present when it is commenced, the county in which the child has resided the majority of the thirty days prior to the date of the alleged deprivation, or the county where the alleged deprivation has occurred. The court shall determine the appropriate venue for a deprivation action based upon the best interests of the child.

27-20-12. Transfer to another juvenile court within the state.
1. If the child resides in a county of the state and the proceeding is commenced in a court of another county, the court, on motion of a party or on its own motion made prior to final disposition, may transfer the proceeding to the county of the child's residence for further action. Like transfer may be made if the residence of the child changes pending the proceeding. The proceeding must be transferred if the child has been adjudicated delinquent or unruly and other proceedings involving the child are pending in the juvenile court of the county of his residence.
2. Certified copies of all legal and social documents and records pertaining to the case on file with the clerk of the court must accompany the transfer.

27-20-13. Taking into custody.
1. A child may be taken into custody:
a. Pursuant to an order of the court under this chapter;
b. Pursuant to the laws of arrest;
c. By a law enforcement officer or a juvenile supervisor if there are reasonable grounds to believe (1) that the child is suffering from illness or injury or is in immediate danger from his surroundings, and that his removal is necessary, or (2) that the child has run away from his parents, guardian, or other custodian; or
d. By order of the juvenile supervisor made pursuant to

subdivision h of subsection 1 of section 27-20-06.
2. The taking of a child into custody is not an arrest, except for the purpose of determining its validity under the Constitution of North Dakota or the Constitution of the United States.

27-20-14. Detention of child. A child taken into custody may not be detained or placed in shelter care prior to the hearing on the petition unless his detention or care is required to protect the person or property of others or of the child or because the child may abscond or be removed from the jurisdiction of the court or because he has no parent, guardian, or custodian or other person able to provide supervision and care for him and return him to the court when required, or an order for his detention or shelter care has been made by the court pursuant to this chapter.

27-20-15. Release or delivery to court.
1. A person taking a child into custody, with all reasonable speed and without first taking the child elsewhere, shall:
a. Release the child to his parent, guardian, custodian, or other responsible adult able and willing to assume custody of the child, upon his promise to bring the child before the court when requested by the court, unless his detention or shelter care is warranted or required under section 27-20-14; or
b. Bring the child before the court or deliver him to a detention or shelter care facility designated by the court or to a medical facility if the child is believed to suffer from a serious physical condition or illness which requires prompt treatment. He shall promptly give written notice thereof, together with a statement of the reason for taking the child into custody, to a parent, guardian, or other custodian and to the court. Any temporary detention or questioning of the child necessary to comply with this subsection must conform to the procedures and conditions prescribed by this chapter and rules of court.

2. If a parent, guardian, or other custodian, when requested, fails to bring the child before the court as provided in subsection 1 the court may issue its warrant directing that the child be taken into custody and brought before the court.

27-20-16. Place of detention.

1. A child alleged to be delinquent or unruly may be detained only in:

a. A licensed foster home or a home approved by the court;

b. A facility operated by a licensed child welfare agency;

c. A detention home or center for delinquent or unruly children which is under the direction or supervision of the court or other public authority or of a private agency approved by the court;

d. Any other suitable place or facility, including a medical facility for the treatment of mental illness, alcoholism, or drug addiction, designated by the court; or

e. A jail or other facility for the detention of adults only if the facility in subdivision c is not available, the detention is in a room separate and removed from those for adults, it appears to the satisfaction of the court or the juvenile supervisor, intake officer, or other authorized officer of the court, that public safety and protection reasonably require detention, and it is so authorized.

2. The official in charge of a jail or other facility for the detention of adult offenders or persons charged with crime shall inform the court immediately if a person who is or appears to be a child is received at the facility and shall bring the person before the court upon request or deliver the person to a detention or shelter care facility designated by the court.

3. If a case is transferred to another court for criminal prosecution the child may be transferred to the appropriate officer or detention facility in accordance with the law governing the detention of persons charged with crime.

4. A child alleged to be deprived may be placed in shelter care

only in the facilities stated in subdivisions a, b, and d of subsection 1 and may not be detained in a jail or other facility intended or used for the detention of adults charged with criminal offenses or of children alleged to be delinquent or unruly.
5. Effective January 1, 1988, a child alleged to be unruly may be detained only in the facilities listed in subdivisions a, b, c, and d of subsection 1.

27-20-17. Release from detention or shelter care - Hearing - Conditions of release.
1. If a child is brought before the court or delivered to a detention or shelter care facility designated by the court, the juvenile supervisor, the intake officer, or other authorized officer of the court shall immediately make an investigation and release the child unless it appears that the child's detention or shelter care is warranted or required under section 27-20-14.
2. If the child is not released, a judge or referee shall hold a detention or shelter care hearing promptly and not later than ninety-six hours after the child is placed in detention or shelter care to determine whether there is probable cause to believe the child has committed the delinquent or unruly acts alleged, or the child is deprived and whether the child's detention or shelter care is required under section 27-20-14.
Reasonable notice thereof, either oral or written, stating the time, place, and purpose of the detention or shelter care hearing must be given to the child and, if they can be found, to the child's parents, guardian, or other custodian. Prior to the commencement of the hearing, the court shall inform the parties of their right to counsel and to appointed counsel if they are needy persons, and of the child's right to remain silent with respect to any allegations of delinquency or unruly conduct.
3. If continued shelter care is required, the judge or referee may order that the child be kept in shelter care for no more than

sixty days from the date of the shelter care hearing.
4. As a condition to the child's release from shelter care, the court may order a parent, guardian, custodian, or any other member of the household in which the child resides to vacate the child's residence if probable cause exists to believe that the parent, guardian, custodian, or other member of the household has committed a sexual offense with or against the child, pursuant to sections 12.1-20-03 through 12.1-20-07 or section 12.1-20-11, and the presence of the alleged sexual offender in the child's residence presents a danger to the child's life or physical, emotional, or mental health.
5. If the child is not released and a parent, guardian, or custodian has not been notified of the hearing, did not appear or waive appearance at the hearing, and files an affidavit showing these facts, the court shall rehear the matter without unnecessary delay and order the child's release, unless it appears from the hearing that the child's detention or shelter care is required under section 27-20-14.

27-20-18. Subpoena. Upon application of a party the court or the clerk of the court shall issue, or the court on its own motion may issue, subpoenas requiring attendance and testimony of witnesses and production of papers at any hearing under this chapter.

27-20-19. Petition - Preliminary determination. A petition under this chapter may not be filed unless the juvenile supervisor, the court, or other person authorized by the court has determined and endorsed upon the petition that the filing of the petition is in the best interest of the public and the child.

27-20-20. Petition - Who may make. Subject to section 27-20-19 the petition may be made by any person, including a law enforcement officer, who has knowledge of the facts

alleged or is informed and believes that they are true.

27-20-20.1. Petition to terminate parental rights - When brought - Definitions.

1. A petition to terminate parental rights may be made as provided under this section and section 27-20-45.

2. Except as provided in subsection 3, a petition for termination of parental rights must be filed:

a. If the child has been in foster care, in the custody of the department, or, in cases arising out of an adjudication by the court that a child is an unruly child, the division of juvenile services, for at least four hundred fifty out of the previous six hundred sixty nights;

b. Within sixty days after a court of competent jurisdiction has found the child to be an abandoned infant; or

c. Within sixty days after a court of competent jurisdiction has convicted the child's parent of one of the following crimes, or of an offense under the laws of another jurisdiction which requires proof of substantially similar elements:

(1) A violation of section 12.1-16-01, 12.1-16-02, or 12.1-16-03, or subdivision a of subsection 1 of section 14-09-22 in which the victim is another child of the parent;

(2) Aiding, abetting, attempting, conspiring, or soliciting a violation of section 12.1-16-01, 12.1-16-02, or 12.1-16-03 in which the victim is a child of the parent; or

(3) A violation of section 12.1-17-02 in which the victim is a child of the parent and has suffered serious bodily injury.

3. A petition for termination of parental rights need not be filed if:

a. The child is being cared for by a relative approved by the department;

b. The department has documented in the case plan a compelling reason for determining that filing such a petition would not be in the child's best interests and has notified the

court that the documentation is available for review by the court; or

c. The department has determined:

(1) Reasonable efforts to preserve and reunify the family are required under section 27-20-32.2 to be made with respect to the child;

(2) The case plan provides such services are necessary for the safe return of the child to the child's home; and

(3) Such services have not been provided consistent with time periods described in the case plan.

4. For purposes of subsection 2, a child in foster care entered foster care on the earlier of:

a. The date of the court's order if the court:

(1) Made a finding that the child has been subjected to child abuse or neglect;

(2) Determined that it is unsafe or contrary to the welfare of the child to remain in the home; and

(3) Granted custody of the child to the department or, in cases arising out of an adjudication by the court that a child is an unruly child, the division of juvenile services; or

b. The date that is sixty days after:

(1) The date of a hearing under section 27-20-17 which results in retaining a child in shelter care;

(2) The date of an order in a dispositional hearing under which a child is placed in foster care; or

(3) The date a child is placed in foster care voluntarily and with the consent of the child's parent.

5. For purposes of subsection 2, a child leaves foster care when:

a. The court enters an order:

(1) Denying a petition to grant care, custody, and control of the child to the department or the division of juvenile services;

(2) Terminating an order that granted custody of the child to the department or the division of juvenile services; or

(3) Appointing a legal guardian under section 27-20-48.1;

b. The court order under which the child entered foster care ends by operation of law;
c. The child is placed in a parental home by the court or a legal custodian other than the division of juvenile services and the legal custodian lacks authority to remove the child without further order of the court; or
d. The child is placed in a parental home by the division of juvenile services.
6. For purposes of subsection 2, a child is not in foster care on any night during which the child is:
a. On a trial home visit;
b. Receiving services at the youth correctional center pursuant to an adjudication of delinquency; or
c. Absent without leave from the place in which the child was receiving foster care.
7. For purposes of this section:
a. "A finding that the child has been subjected to child abuse or neglect" means:
(1) A finding of deprivation made under chapter 27-20; or
(2) A conviction of a person, responsible for a child's welfare, for conduct involving the child, under chapter 12.1-16 or sections 12.1-17-01 through 12.1-17-04 or 12.1-20-01 through 12.1-20-08.
b. "Compelling reason" means a recorded statement that reflects consideration of:
(1) The child's age;
(2) The portion of the child's life spent living in the household of a parent of the child;
(3) The availability of an adoptive home suitable to the child's needs;
(4) Whether the child has special needs; and
(5) The expressed wishes of a child age ten or older.
c. "Department" means the department of human services or its designee, including any county social service board.

27-20-21. Contents of petition. The petition must be verified and may be on information and belief. It must set forth plainly:
1. The facts which bring the child within the jurisdiction of the court, with a statement that it is in the best interest of the child and the public that the proceeding be brought and, if delinquency or unruly conduct is alleged, that the child is in need of treatment or rehabilitation;
2. The name, age, and residence address, if any, of the child on whose behalf the petition is brought;
3. The names and residence addresses, if known to petitioner, of the parents, guardian, or custodian of the child and of the child's spouse, if any. If none of his parents, guardian, or custodian resides or can be found within the state, or if their respective places of residence address are unknown, the name of any known adult relative residing within the county, or, if there be none, the known adult relative residing nearest to the location of the court; and
4. Whether the child is in custody and, if so, the place of his detention and the time he was taken into custody.

27-20-22. Summons.
1. After the petition has been filed, the court shall fix a time for hearing. Except as otherwise provided in this subsection, the hearing may not be later than thirty days after the filing of the petition. If the child is in detention, the time for the initial hearing may not be later than fourteen days after the child has been taken into custody. If a child is in shelter care, the hearing on the petition must be held within sixty days of the initial shelter care hearing. The court may extend the time for hearing for good cause shown. The court shall direct the issuance of a summons to the parents, guardian, or other custodian, a guardian ad litem, and any other persons as appear to the court to be proper or necessary parties to the proceeding, requiring them to appear before the court at the time fixed to answer the

allegations of the petition. The summons must also be directed to the child if the child is fourteen or more years of age or is alleged to be a delinquent or unruly child. A copy of the petition must accompany the summons unless the summons is served by publication in which case the published summons must indicate the general nature of the allegations and where a copy of the petition can be obtained.

2. The court may endorse upon the summons an order directing the parents, guardian, or other custodian of the child to appear personally at the hearing and directing the person having the physical custody or control of the child to bring the child to the hearing.

3. If it appears from affidavit filed or from sworn testimony before the court that the conduct, condition, or surroundings of the child are endangering the child's health or welfare or those of others, or that the child may abscond or be removed from the jurisdiction of the court or will not be brought before the court, notwithstanding the service of the summons, the court may endorse upon the summons an order that a law enforcement officer shall serve the summons and take the child into immediate custody and bring the child before the court.

4. The summons must state that a party is entitled to counsel in the proceedings and that the court will appoint counsel if the party is unable without undue financial hardship to employ counsel.

5. A party, other than the child, may waive service of summons by written stipulation or by voluntary appearance at the hearing. If the child is present at the hearing, the child's counsel, with the consent of the parent, guardian, or other custodian, or guardian ad litem, may waive service of summons in the child's behalf.

6. When a child is in detention or shelter care and good cause is shown why service was not completed upon an absent or noncustodial parent, the court may proceed with the hearing on

the petition in order to comply with any time limitations under this chapter.

27-20-23. Service of summons.
1. If a party to be served with a summons is within this state and can be found, the summons must be served upon him in accordance with rule 4 of the North Dakota Rules of Civil Procedure at least twenty-four hours before the hearing. If he is within this state and cannot be found, but his address is known or can with reasonable diligence be ascertained, the summons may be served upon him by mailing a copy by registered or certified mail at least five days before the hearing. If he is without this state but he can be found or his address is known, or his whereabouts or address can with reasonable diligence be ascertained, service of the summons may be made either by delivering a copy to him personally or mailing a copy to him by registered or certified mail at least five days before the hearing.
2. If after reasonable effort he cannot be found or his post-office address ascertained, whether he is within or without this state, the court may order service of the summons upon him by publication in accordance with rule 4 of the North Dakota Rules of Civil Procedure. The hearing may not be earlier than five days after the date of the last publication.
3. Service of the summons may be made by any suitable person under the direction of the court.
4. The court may authorize the payment from state funds of the costs of service and of necessary travel expenses incurred by persons summoned or otherwise required to appear at the hearing.

27-20-24. Conduct of hearings.
1. Hearings under this chapter must be conducted by the court without a jury, in an informal but orderly manner, and separately from other proceedings not included in section

27-20-03.
2. If the hearing has not been held within the time limit, or any extension thereof, required by subsection 1 of section 27-20-22, the petition must be dismissed.
3. The state's attorney upon request of the court shall present the evidence in support of any allegations of the petition not admitted and otherwise conduct the proceedings on behalf of the state.
4. The proceedings must be recorded by stenographic notes or by electronic, mechanical, or other appropriate means.
5. Hearings are open to the public if the purpose of the hearing is to declare a person in contempt of court or to consider a petition alleging an offense identified under subdivision b of subsection 1 of section 27-20-34 or subsection 2 of section 27-20-34. The general public must be excluded from other hearings under this chapter. In hearings from which the general public is excluded, only the parties, their counsel, witnesses, victims, and other persons accompanying a party for that person's assistance, and any other persons as the court finds have a proper interest in the proceedings or in the work of the court may be admitted by the court. The court may temporarily exclude the child from the hearing except while allegations of that child's delinquency or unruly conduct are being heard.

27-20-25. Service by publication - Interlocutory order of disposition.
1. If service of summons upon a party is being or will be made by publication, the court may conduct a provisional hearing upon the allegations of the petition and enter an interlocutory order of disposition if:
a. The petition alleges delinquency, unruly conduct, or deprivation of the child;
b. The summons served upon any party:
(1) States that prior to the final hearing on the petition

designated in the summons a provisional hearing thereon will be held at a specified time and place;
(2) Requires any party who is served other than by publication to appear and answer the allegations of the petition at the provisional hearing;
(3) States further that findings of fact and orders of disposition made pursuant to the provisional hearing will become final at the final hearing unless the party served by publication appears at the final hearing; and
(4) Otherwise conforms to section 27-20-22; and
c. If the child is of sufficient age and understanding to comprehend the proceedings, the child must be personally before the court at the provisional hearing.
2. All provisions of this chapter applicable to a hearing on a petition, to orders of disposition, and to other proceedings dependent thereon apply under this section, but findings of fact and orders of disposition have only interlocutory effect pending the final hearing on the petition. The rights and duties of the party served, who is being served, or who will be served by publication are not affected except as provided in subsection 3.
3. If the party served by publication fails to appear at the final hearing on the petition, the findings of fact and interlocutory orders made become final without further evidence and are governed by this chapter as if made at the final hearing. If the party appears at the final hearing, the findings and orders must be vacated and disregarded and the hearing must proceed upon the allegations of the petition without regard to this section, unless otherwise agreed to by the party who had been served by publication.

27-20-26. Right to counsel.
1. Except as otherwise provided under this chapter, a party is entitled to representation by legal counsel at custodial, post-petition, and informal adjustment stages of proceedings

under this chapter and, if as a needy person the party is unable to employ counsel, to have the court provide counsel for the party. If a party appears without counsel the court shall ascertain whether the party knows of the party's right to counsel and to be provided with counsel by the court if the party is a needy person. The court may continue the proceeding to enable a party to obtain counsel and shall provide counsel for an unrepresented needy person upon the person's request. Counsel must be provided for a child not represented by the child's parent, guardian, or custodian at custodial, post-petition, and informal adjustment stages of proceedings under this chapter. If the interests of two or more parties conflict, separate counsel must be provided for each of them.

2. A needy person is one who at the time of requesting counsel is unable, without undue financial hardship, to provide for full payment of legal counsel and all other necessary expenses for representation. A child is not to be considered needy under this section if the child's parents or parent can, without undue financial hardship, provide full payment for legal counsel and other expenses of representation. Any parent entitled to the custody of a child involved in a proceeding under this chapter is, unless undue financial hardship would ensue, responsible for providing legal counsel and for paying other necessary expenses of representation for the parent's child. The court may enforce performance of this duty by appropriate order. As used in this subsection, the word "parent" includes adoptive parents.

27-20-27. Other basic rights.

1. A party is entitled to the opportunity to introduce evidence and otherwise be heard in his own behalf and to cross-examine adverse witnesses.

2. A child charged with a delinquent act need not be a witness against or otherwise incriminate himself. An extrajudicial statement, if obtained in the course of violation of this chapter

or which would be constitutionally inadmissible in a criminal proceeding, may not be used against him. Evidence illegally seized or obtained may not be received over objection to establish the allegations made against him. A confession validly made by a child out of court is insufficient to support an adjudication of delinquency unless it is corroborated in whole or in part by other evidence.

27-20-27.1. Orders directed to parents or guardians. It is the policy of this state that every parent or guardian has an obligation to participate in any treatment of the parent's or guardian's child as ordered by the juvenile court. The juvenile court may hold any parent or guardian who willfully fails to participate in the treatment in contempt of court.

27-20-28. Investigation and report.
1. If the allegations of a petition are admitted by a party or notice of a hearing under section 27-20-34 has been given, the court, prior to the hearing on need for treatment or rehabilitation and disposition, may direct that a social study and report in writing to the court be made by the juvenile supervisor or other person designated by the court, concerning the child, his family, his environment, and other matters relevant to disposition of the case. If the allegations of the petition are not admitted and notice of a hearing under section 27-20-34 has not been given, the court may not direct the making of the study and report until after the court has heard the petition upon notice of hearing given pursuant to this chapter and the court has found that the child committed a delinquent act or is an unruly or deprived child.
2. During the pendency of any proceeding the court may order the child to be examined at a suitable place by a physician, psychologist, or certified addiction counselor and may also order medical or surgical treatment of a child who is suffering

from a serious physical condition or illness, or alcohol or drug abuse, which in the opinion of a licensed physician requires prompt treatment, even if the parent, guardian, or other custodian has not been given notice of a hearing, is not available, or without good cause informs the court of his refusal to consent to the treatment.

27-20-29. Hearing - Findings - Dismissal.

1. After hearing the evidence on the petition the court shall make and file its findings as to whether the child is a deprived child, or if the petition alleges that the child is delinquent or unruly, whether the acts ascribed to the child were committed by him. If the court finds that the child is not a deprived child or that the allegations of delinquency or unruly conduct have not been established, it shall dismiss the petition and order the child discharged from any detention or other restriction theretofore ordered in the proceeding.

2. If the court finds on proof beyond a reasonable doubt that the child committed the acts by reason of which he is alleged to be delinquent or unruly, it shall proceed immediately or at a postponed hearing to hear evidence as to whether the child is in need of treatment or rehabilitation and to make and file its findings thereon. In the absence of evidence to the contrary, evidence of the commission of acts which constitute a felony is sufficient to sustain a finding that the child is in need of treatment or rehabilitation. If the court finds that the child is not in need of treatment or rehabilitation, it shall dismiss the proceeding and discharge the child from any detention or other restriction theretofore ordered.

3. If the court finds from clear and convincing evidence that the child is deprived or that he is in need of treatment or rehabilitation as a delinquent or unruly child, the court shall proceed immediately or at a postponed hearing to make a proper disposition of the case.

4. In hearings under subsections 2 and 3, all evidence helpful in determining the questions presented, including oral and written reports, may be received by the court and relied upon to the extent of its probative value even though not otherwise competent in the hearing on the petition. The parties or their counsel must be afforded an opportunity to examine and controvert written reports so received and to cross-examine individuals making the reports. Sources of confidential information need not be disclosed.
5. On its motion or that of a party, the court may continue the hearings under this section for a reasonable period to receive reports and other evidence bearing on the disposition or the need for treatment or rehabilitation. In this event the court shall make an appropriate order for detention of the child or his release from detention subject to supervision of the court during the period of the continuance. In scheduling investigations and hearings the court shall give priority to proceedings in which a child is in detention or has otherwise been removed from his home before an order of disposition has been made.

27-20-30. Disposition of deprived child.
1. If the child is found to be a deprived child, the court may make any of the following orders of disposition best suited to the protection and physical, mental, and moral welfare of the child:
a. Permit the child to remain with the child's parents, guardian, or other custodian, subject to conditions and limitations as the court prescribes, including supervision as directed by the court for the protection of the child.
b. Subject to conditions and limitations as the court prescribes, transfer temporary legal custody to any of the following:
(1) Any individual who, after study by the juvenile supervisor or other person or agency designated by the court, is found by the court to be qualified to receive and care for the child.

(2) An agency or other private organization licensed or otherwise authorized by law to receive and provide care for the child.
(3) The director of the county social service board or other public agency authorized by law to receive and provide care for the child.
(4) An individual in another state with or without supervision by an appropriate officer under section 27-20-40.
c. Without making any of the orders otherwise provided in this section, transfer custody of the child to the juvenile court of another state if authorized by and in accordance with section 27-20-39 if the child is or is about to become a resident of that state.
d. Require the parents, guardian, or other custodian to participate in treatment.
e. Appoint a fit and willing relative or other appropriate individual as the child's legal guardian.
f. In cases in which a compelling reason has been shown that it would not be in the child's best interests to return home, to have parental rights terminated, to be placed for adoption, to be placed with a fit and willing relative, or to be placed with a legal guardian, establish, by order, some other planned permanent living arrangement.
2. Unless a child found to be deprived is found also to be delinquent, the child may not be committed to or confined in an institution or other facility designed or operated for the benefit of delinquent children.

27-20-31. Disposition of delinquent child. If the child is found to be a delinquent child, the court may make any of the following orders of disposition best suited to the child's treatment, rehabilitation, and welfare:
1. Any order authorized by section 27-20-30 for the disposition of a deprived child;

2. Placing the child on probation under the supervision of the juvenile supervisor, probation officer, or other appropriate officer of the court or of the court of another state as provided in section 27-20-41 or the director of the county social service board under conditions and limitations the court prescribes;
3. Ordering the child to pay a fine if the delinquent act committed by the child constitutes manslaughter resulting from the operation of a motor vehicle in violation of section 12.1-16-02; negligent homicide in violation of section 12.1-16-03; or driving or being in actual physical control of a vehicle in violation of section 39-08-01, or an equivalent ordinance. The court may suspend the imposition of a fine imposed pursuant to this subsection upon such terms and conditions as the court may determine. Fines collected pursuant to this subsection must be paid into the county treasury for disposition pursuant to section 29-27-02.1;
4. Placing the child in an institution, camp, or other facility for delinquent children operated under the direction of the court or other local public authority;
5. Committing the child to the division of juvenile services or to another state department to which commitment of delinquent or unruly children may be made. When necessary, the commitment order may provide that the child initially be placed in a secure facility;
6. Ordering the child to make monetary restitution to the victim of the offense or to complete a specified number of hours of community service as determined by the court, or both;
7. Ordering the periodic testing for the use of illicit drugs or alcohol pursuant to rules or policies adopted by the supreme court; or
8. Under section 27-20-31.1, order the driver's license or permit of the child to be delivered to the juvenile supervisor, probation officer, or other appropriate officer of the court and to inform the director of the department of transportation of the child's

suspension of driving privileges and the duration of the suspension of privileges.

27-20-31.1. Delinquent children - Suspension of driving privileges.

1. If a juvenile is adjudicated delinquent of an offense that would be a class A misdemeanor or a felony if the offense were committed by an adult, the juvenile court may order the suspension of the juvenile's driving privileges for a period of up to six months for the first offense. For a second or subsequent offense, the juvenile court may order the suspension of the juvenile's driving privileges for up to one year. As a condition to the return of driving privileges, the juvenile court may order the successful completion of an appropriate driver's examination.

2. When the juvenile court orders the suspension of a juvenile's driving privileges, the juvenile court shall immediately take possession of the juvenile's driver's license or permit and send copies of the court's order to the director of the department of transportation who shall make notation of the juvenile's suspension of driving privileges.

3. The record of the juvenile's suspension of driving privileges under this section must be kept confidential and may not be released except to law enforcement personnel in connection with law enforcement activities. The record of a juvenile's suspension of driving privileges under this section may not be disclosed to or shared with the licensing officials of any other state or jurisdiction. At the end of the six-month or one-year period, the director shall remove and destroy all record of the juvenile's suspension of driving privileges under this section.

4. This section may not be construed to limit consensual agreements between the juvenile court and the juvenile restricting the driving privileges of the juvenile.

27-20-31.2. Restitution.

1. a. In addition to a child being ordered to make restitution under section 27-20-31, a parent of a child adjudged delinquent may be ordered to make restitution on the child's behalf in an amount not exceeding five thousand dollars.

b. Prior to ordering parental restitution under this section, the court shall hold a hearing on the matter with notice given to all interested parties as to the nature and amount of the parental restitution. In determining whether to order parental restitution, the court must take the following factors into account:

(1) The ability of the parent or parents to pay monetary restitution and the care and control exercised by the parents.

(2) The ability of the child to pay monetary restitution.

(3) Whether ordering parental restitution would detract from the child's treatment, rehabilitation, or welfare.

(4) The number of delinquent acts, if any, previously committed by the child.

c. A parental order of restitution must be limited to those damages directly related to the delinquent act and expenses actually incurred as a result of the delinquent act.

2. Unless the court directs otherwise, any order of restitution under this section or section 27-20-31 may be filed, transcribed, and enforced by the person entitled to the restitution in the same manner as civil judgments rendered by the courts of this state may be enforced. A child against whose parents a judgment may be entered under this section is jointly and severally liable with that child's parents for the amounts up to five thousand dollars and solely liable for any amounts over that amount. Any judgment rendered under this section may not be discharged in bankruptcy and is not subject to the statutes of limitation provided for in chapter 28-01 and the judgment may not be canceled under section 28-20-35.

27-20-32. Disposition of unruly child. If the child is found to be unruly, the court may make any disposition authorized for a

delinquent child except commitment to a secure facility. If after making the disposition the court finds upon a further hearing that the child is not amenable to treatment or rehabilitation under the disposition made, it may make a disposition otherwise authorized by section 27-20-31.

27-20-32.1. Court order required for removal of child. An order of disposition or other adjudication in a proceeding under this chapter, in those cases in which a child is removed from the home of a relative by birth, marriage, or adoption for the reason that continuation in such home would be contrary to the welfare of such child, must specifically state that a continuation of the child in the home of the relative would be contrary to the welfare of the child.

27-20-32.2. Reasonable efforts to prevent removal or to reunify - When required.

1. As used in this section, "reasonable efforts" means the exercise of due diligence, by the agency granted authority over the child under this chapter, to use appropriate and available services to meet the needs of the child and the child's family in order to prevent removal of the child from the child's family or, after removal, to use appropriate and available services to eliminate the need for removal and to reunite the child and the child's family. In determining reasonable efforts to be made with respect to a child under this section, and in making reasonable efforts, the child's health and safety must be the paramount concern.

2. Except as provided in subsection 4, reasonable efforts must be made to preserve and reunify families:

a. Prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; and

b. To make it possible for a child to return safely to the child's

home.
3. If the court or the child's custodian determined that continuation of reasonable efforts, as described in subsection 2, is inconsistent with the permanency plan for the child, reasonable efforts must be made to place the child in a timely manner in accordance with the permanency plan and to complete whatever steps are necessary to finalize the permanent placement of the child.
4. Reasonable efforts of the type described in subsection 2 are not required if:
a. A court of competent jurisdiction has determined that a parent has subjected a child to aggravated circumstances; or
b. The parental rights of the parent, with respect to another child of the parent, have been involuntarily terminated.
5. Efforts to place a child for adoption, with a fit and willing relative or other appropriate individual as a legal guardian, or in another planned permanent living arrangement, may be made concurrently with reasonable efforts of the type described in subsection 2.
6. Removal of a child from the child's home for placement in foster care must be based on judicial findings stated in the court's order, and determined on a case-by-case basis in a manner that complies with the requirements of titles IV-B and IV-E of the Social Security Act [42 U.S.C. 620 et seq. and 42 U.S.C. 6701 et seq.], as amended, and federal regulations adopted thereunder, provided that this subsection may not provide a basis for overturning an otherwise valid court order.

27-20-33. Order of adjudication - Noncriminal.
1. An order of disposition or other adjudication in a proceeding under this chapter is not a conviction of crime and does not impose any civil disability ordinarily resulting from a conviction or operate to disqualify the child in any civil service application or appointment. A child may not be committed or

transferred to a penal institution or other facility used primarily for the execution of sentences of persons convicted of a crime.
2. The disposition of a child and evidence adduced in a hearing in juvenile court may not be used against him in any proceeding in any court other than a juvenile court, whether before or after reaching majority, except for impeachment or in dispositional proceedings after conviction of a felony for the purposes of a presentence investigation and report.

27-20-34. Transfer to other courts.
1. After a petition has been filed alleging delinquency based on conduct which is designated a crime or public offense under the laws, including local ordinances or resolutions of this state, the court before hearing the petition on its merits shall transfer the offense for prosecution to the appropriate court having jurisdiction of the offense if:
a. The child is over sixteen or more years of age and requests the transfer;
b. The child was fourteen years of age or more at the time of the alleged conduct and the court determines that there is probable cause to believe the child committed the alleged delinquent act and the delinquent act involves the offense of murder or attempted murder; gross sexual imposition or the attempted gross sexual imposition of a victim by force or by threat of imminent death, serious bodily injury, or kidnapping; or the manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance in violation of subdivision a or b of subsection 1 of section 19-03.1-23, except for the manufacture, delivery, or possession with intent to manufacture or deliver marijuana in an amount less than one pound [.45 kilograms]; or the gratuitous delivery of a controlled substance not a narcotic drug or methamphetamine which is a singular and isolated event involving an amount of controlled substance sufficient solely for a single personal use; or

c. (1) The child was fourteen or more years of age at the time of the alleged conduct;
(2) A hearing on whether the transfer should be made is held in conformity with sections 27-20-24, 27-20-26, and 27-20-27;
(3) Notice in writing of the time, place, and purpose of the hearing is given to the child and the child's parents, guardian, or other custodian at least three days before the hearing; and
(4) The court finds that there are reasonable grounds to believe that:
(a) The child committed the delinquent act alleged;
(b) The child is not amenable to treatment or rehabilitation as a juvenile through available programs;
(c) The child is not treatable in an institution for the mentally retarded or mentally ill;
(d) The interests of the community require that the child be placed under legal restraint or discipline; and
(e) If the child is fourteen or fifteen years old, the child committed a delinquent act involving the infliction or threat of serious bodily harm.
2. The burden of proving reasonable grounds to believe that a child is amenable to treatment or rehabilitation as a juvenile through available programs is on the child in those cases in which the alleged delinquent act involves the offense of manslaughter, aggravated assault, robbery, arson involving an inhabited structure, or escape involving the use of a firearm, destructive device, or other dangerous weapon or in those cases where the alleged delinquent act involves an offense which if committed by an adult would be a felony and the child has two or more previous delinquency adjudications for offenses which would be a felony if committed by an adult.
3. In determining a child's amenability to treatment and rehabilitation, the court shall consider and make specific findings on the following factors:
a. Age;

b. Mental capacity;
c. Maturity;
d. Degree of criminal sophistication exhibited;
e. Previous record;
f. Success or failure of previous attempts to rehabilitate;
g. Whether the juvenile can be rehabilitated prior to expiration of juvenile court jurisdiction;
h. Any psychological, probation, or institutional reports;
i. The nature and circumstances of the acts for which the transfer is sought;
j. The prospect for adequate protection of the public; and
k. Any other relevant factors.

4. The transfer terminates the jurisdiction of the juvenile court over the child with respect to the delinquent acts alleged in the petition. In addition, any transfer under subdivision b or c of subsection 1 operates to terminate the juvenile court's jurisdiction over the child with respect to any future offense if the child is ultimately convicted of the offense giving rise to the transfer.

5. No child subject to the jurisdiction of the juvenile court, either before or after reaching eighteen years of age, may be prosecuted for an offense previously committed unless the case has been transferred as provided in this section.

6. Statements made by the child at the hearing under this section are not admissible against the child over objection in the criminal proceedings following the transfer except for impeachment.

7. If the case is not transferred, the judge who conducted the hearing may not over objection of an interested party preside at the hearing on the petition. If the case is transferred to a court of which the judge who conducted the hearing is also a judge, the judge likewise is disqualified over objection from presiding in the prosecution.

8. A person at least twenty years of age who committed an

offense while a child and was not adjudicated for the offense in juvenile court may be prosecuted in district court as an adult, unless the state intentionally delayed the prosecution to avoid juvenile court jurisdiction. The district court has original and exclusive jurisdiction for the prosecution under this subsection.

27-20-35. Disposition of mentally ill, mentally retarded, alcohol, or drug abusing child.

1. If, at a dispositional hearing of a child found to be a delinquent or unruly child or at a hearing to transfer a child to another court under section 27-20-34, the evidence indicates that the child may be suffering from mental retardation or mental illness, or alcohol or drug abuse, the court before making a disposition shall commit the child for a period not exceeding sixty days to an appropriate institution, agency, or individual for study and report on the child's mental or physical condition.
2. If it appears from the study and report that the child is committable under the laws of this state as a mentally retarded or mentally ill child, the court shall order the child detained and direct that within ten days after the order the court resume proceedings in the juvenile court for the child's commitment to an appropriate institution or agency.
3. If it does not so appear or the child is found not to be committable, the court shall proceed to the disposition or transfer of the child as otherwise provided by this chapter.

27-20-36. Limitations of time on orders of disposition.

1. An order terminating parental rights or establishing a legal guardianship is without limit as to duration.
2. An order of disposition committing a delinquent or unruly child to the division of juvenile services continues in force for not more than two years, excluding any period of time the child is on parole from an institution, or until the child is sooner

discharged by an institution.

a. The court which made the order may extend its duration for additional two-year periods subject to like discharge, if:

(1) A hearing is held upon motion of the division, or on the court's own motion, prior to the expiration of the order;

(2) Reasonable notice of the hearing and an opportunity to be heard are given to the child and the parent, guardian, or other custodian; and

(3) The court finds that the extension is necessary for the treatment or rehabilitation of the child.

b. A permanency hearing must be conducted within thirty days after a court determines that aggravated circumstances of the type described in subdivisions a, c, d, or e of subsection 3 of section 27-20-02 exist, or within twelve months after a child, subject to an order of disposition under this subsection, is considered to have entered foster care, or is continued in foster care following a previous permanency hearing. The permanency hearing may be conducted:

(1) By the division of juvenile services as a placement hearing under chapter 27-21; or

(2) By the court, if the court requires, or if it appears that an appropriate permanency plan could not be carried out without exceeding the authority of the division of juvenile services.

3. Except as provided in subsection 2, an order of disposition pursuant to which a child is placed in foster care may not continue in force for more than twelve months after the child is considered to have entered foster care. Before the extension of any court order limited under this subsection, a permanency hearing must be conducted. Any other order of disposition may not continue in force for more than two years.

4. Except as provided in subsection 1, the court may terminate an order of disposition before the expiration of the order or extend its duration for further periods. An order of extension may be made if:

a. A hearing is held before the expiration of the order upon motion of a party or on the court's own motion;
b. Reasonable notice of the hearing and opportunity to be heard are given to the parties affected;
c. The court finds the extension is necessary to accomplish the purposes of the order extended; and
d. The extension does not exceed twelve months from the expiration of an order limited by subsection 3 or two years from the expiration of any other limited order.
5. Except as provided in subsection 2, the court may terminate an order of disposition or extension prior to its expiration, on or without an application of a party, if it appears to the court that the purposes of the order have been accomplished. If a party may be adversely affected by the order of termination, the order may be made only after reasonable notice and opportunity to be heard have been given to the party.
6. Except as provided in subsection 1, when the child attains the age of twenty years, all orders affecting the child then in force terminate and the child is discharged from further obligation or control.
7. If an order of disposition is made with respect to a child under the age of ten years pursuant to which the child is placed in foster care without terminating parental rights and the parent and child relationship, the court, before extending the duration of the order, shall determine upon the extension hearing whether the child is adoptable and whether termination of those rights and that relationship is warranted under section 27-20-44 and is in the best interest of the child. In that case the notice of the extension hearing must also inform the parties affected that the court will determine whether the child is adoptable and whether termination of their parental rights and the parent and child relationship is warranted and in the best interest of the child and that a further order of disposition may be made by the court placing the child with a view to adoption. If the court

determines that the child is adoptable and that termination of parental rights and the parent and child relationship is warranted and is in the best interest of the child, the court shall make a further order of disposition terminating those rights and that relationship and committing the child under section 27-20-47.

27-20-37. Modification or vacation of orders.
1. An order of the court must be set aside if (a) it appears that it was obtained by fraud or mistake sufficient therefor in a civil action, or (b) the court lacked jurisdiction over a necessary party or of the subject matter, or (c) newly discovered evidence so requires.
2. Except an order terminating parental rights, or an order of dismissal, an order of the court may also be changed, modified, or vacated on the ground that changed circumstances so require in the best interest of the child. An order terminating parental rights and the parent and child relationship may be vacated by the court upon motion of the parent if the child is not on placement for adoption and the person having custody of the child consents in writing to the vacation of the decree. An order granting probation to a child found to be delinquent or unruly may be revoked on the ground that the conditions of probation have not been observed.
3. Any party to the proceeding, the juvenile supervisor or other person having supervision or legal custody of or an interest in the child may petition the court for the relief provided in this section. The petition must set forth in concise language the grounds upon which the relief is requested.
4. After the petition is filed the court shall fix a time for hearing and cause notice to be served (as a summons is served under section 27-20-23) on the parties to the proceeding or affected by the relief sought. After the hearing, which may be informal, the court shall deny or grant relief as the evidence warrants.

27-20-38. Rights and duties of legal custodian. A custodian to whom legal custody has been given by the court under this chapter has the right to the physical custody of the child and the right to determine the nature of the care, placement, and treatment of the child, including ordinary medical care as well as medical or surgical treatment for a serious physical condition or illness which in the opinion of a licensed physician requires prompt treatment, except for any limits the court may impose. The custodian also has the right and duty to provide for the care, protection, training, and education, and the physical, mental, and moral welfare of the child, subject to the conditions and limitations of the order and to the remaining rights and duties of the child's parents or guardian.

27-20-39. Disposition of nonresident child.
1. If the court finds that a child who has been adjudged to have committed a delinquent act or to be unruly or deprived is or is about to become a resident of another state which has adopted the Uniform Juvenile Court Act, or a substantially similar act which includes provisions corresponding to sections 27-20-39 and 27-20-40, the court may defer hearing on need for treatment or rehabilitation and disposition and request by any appropriate means the juvenile court of the county of the child's residence or prospective residence to accept jurisdiction of the child.
2. If the child becomes a resident of another state while on probation or under protective supervision under order of a juvenile court of this state, the court may request the juvenile court of the county of the state in which the child has become a resident to accept jurisdiction of the child and to continue his probation or protective supervision.
3. Upon receipt and filing of an acceptance, the court of this state shall transfer custody of the child to the accepting court and cause him to be delivered to the person designated by that

court to receive his custody. It also shall provide that court with certified copies of the order adjudging the child to be a delinquent, unruly, or deprived child, of the order of transfer, and if the child is on probation or under protective supervision under order of the court, of the order of disposition. It also shall provide that court with a statement of the facts found by the court of this state and any recommendations and other information it considers of assistance to the accepting court in making a disposition of the case or in supervising the child on probation or otherwise.

4. Upon compliance with subsection 3, the jurisdiction of the court of this state over the child is terminated.

27-20-40. Disposition of resident child received from another state.

1. If a juvenile court of another state which has adopted the Uniform Juvenile Court Act, or a substantially similar act which includes provisions corresponding to sections 27-20-39 and 27-20-40, requests a juvenile court of this state to accept jurisdiction of a child found by the requesting court to have committed a delinquent act or to be an unruly or deprived child, and the court of this state finds, after investigation that the child is, or is about to become, a resident of the county in which the court presides, it shall promptly and not later than fourteen days after receiving the request issue its acceptance in writing to the requesting court and direct its juvenile supervisor or other person designated by it to take physical custody of the child from the requesting court and bring him before the court of this state or make other appropriate provisions for his appearance before the court.

2. Upon the filing of certified copies of the orders of the requesting court (a) determining that the child committed a delinquent act or is an unruly or deprived child, and (b) committing the child to the jurisdiction of the juvenile court of

this state, the court of this state shall immediately fix a time for a hearing on the need for treatment or rehabilitation and disposition of the child or on the continuance of any probation or protective supervision.

3. The hearing and notice thereof and all subsequent proceedings are governed by this chapter. The court may make any order of disposition permitted by the facts and this chapter. The orders of the requesting court are conclusive that the child committed the delinquent act or is an unruly or deprived child and of the facts found by the court in making the orders, subject only to section 27-20-37. If the requesting court has made an order placing the child on probation or under protective supervision, a like order shall be entered by the court of this state. The court may modify or vacate the order in accordance with section 27-20-37.

27-20-41. Ordering out-of-state supervision.

1. Subject to the provisions of this chapter governing dispositions and to the extent that funds of the county are available, the court may place a child in the custody of a suitable person in another state. On obtaining the written consent of a juvenile court of another state which has adopted the Uniform Juvenile Court Act or a substantially similar act which includes provisions corresponding to sections 27-20-41 and 27-20-42, the court of this state may order that the child be placed under the supervision of a probation officer or other appropriate official designated by the accepting court. One certified copy of the order must be sent to the accepting court and another filed with the clerk of the board of county commissioners of the county of the requesting court of this state.

2. The reasonable cost of the supervision including the expenses of necessary travel must be borne by the county of the requesting court of this state. Upon receiving a certified

statement signed by the judge of the accepting court of the cost incurred by the supervision, the court of this state shall certify if it so appears that the sum so stated was reasonably incurred and file it with the county auditor of the county for payment. The appropriate officials shall thereupon issue a warrant for the sum stated payable to the appropriate officials of the county of the accepting court.

27-20-42. Supervision under out-of-state order.

1. Upon receiving a request of a juvenile court of another state which has adopted the Uniform Juvenile Court Act, or a substantially similar act which includes provisions corresponding to sections 27-20-41 and 27-20-42 to provide supervision of a child under the jurisdiction of that court, a court of this state may issue its written acceptance to the requesting court and designate its juvenile supervisor, probation officer, or other appropriate officer who is to provide supervision, stating the probable cost per day therefor.
2. Upon the receipt and filing of a certified copy of the order of the requesting court placing the child under the supervision of the officer so designated, the officer shall arrange for the reception of the child from the requesting court, provide supervision pursuant to the order and this chapter, and report thereon from time to time together with any recommendations he may have to the requesting court.
3. The court in this state from time to time shall certify to the requesting court the cost of supervision that has been incurred and request payment therefor from the appropriate officials of the county of the requesting court to the appropriate officials of the county of the accepting court.
4. The court of this state at any time may terminate supervision by notifying the requesting court. In that case, or if the supervision is terminated by the requesting court, the officer of the court supervising the child shall return the child to a

representative of the requesting court authorized to receive him.

27-20-43. Powers of out-of-state probation officers. If a child has been placed on probation or protective supervision by a juvenile court of another state which has adopted the Uniform Juvenile Court Act or a substantially similar act which includes provisions corresponding to this section, and the child is in this state with or without the permission of that court, the juvenile supervisor or probation officer of that court or other person designated by that court to supervise or take custody of the child has all the powers and privileges in this state with respect to the child as given by this chapter to like officers or persons of this state, including the right of visitation, counseling, control, and direction, taking into custody, and returning to that state.

27-20-44. Termination of parental rights.
1. The court by order may terminate the parental rights of a parent with respect to the parent's child if:
a. The parent has abandoned the child;
b. The child is a deprived child and the court finds:
(1) The conditions and causes of the deprivation are likely to continue or will not be remedied and that by reason thereof the child is suffering or will probably suffer serious physical, mental, moral, or emotional harm;
(2) The child has been in foster care, in the care, custody, and control of the department, or a county social service board, or, in cases arising out of an adjudication by the juvenile court that a child is an unruly child, the division of juvenile services, for at least four hundred fifty out of the previous six hundred sixty nights; or
(3) A court of competent jurisdiction has convicted the child's parent of one of the following crimes, or of an offense under the laws of another jurisdiction which requires proof of

substantially similar elements:
(a) A violation of section 12.1-16-01, 12.1-16-02, or 12.1-16-03 in which the victim is another child of the parent;
(b) Aiding, abetting, attempting, conspiring, or soliciting a violation of section 12.1-16-01, 12.1-16-02, or 12.1-16-03 in which the victim is a child of the parent; or
(c) A violation of section 12.1-17-02 in which the victim is a child of the parent and has suffered serious bodily injury; or
c. The written consent of the parent acknowledged before the court has been given.
2. If the court does not make an order of termination of parental rights, it may grant an order under section 27-20-30 if the court finds from clear and convincing evidence that the child is a deprived child.

27-20-45. Proceeding for termination of parental rights.
1. The petition must comply with section 27-20-21 and state clearly that an order for termination of parental rights is requested and that the effect will be as stated in section 27-20-46.
2. If both of the natural parents of the child are not named in the petition either as petitioner or as respondent, the court shall cause inquiry to be made of the petitioner and other appropriate persons in an effort to identify an unnamed parent. The inquiry must include, to the extent necessary and appropriate, all of the following:
a. Whether any man is presumed to be the father of the child under the Uniform Parentage Act.
b. Whether the natural mother of the child was cohabiting with a man at the time of conception or birth of the child.
c. Whether the natural mother of the child has received from any man support payments or promises of support with respect to the child or in connection with her pregnancy.
d. Whether any person has formally or informally

acknowledged or declared that person's possible parentage of the child.
e. Whether any person claims any right to custody of the child.
3. The court shall add as respondent to the petition and cause to be served with a summons any person identified by the court as an unnamed parent, unless the person has relinquished parental rights, or parental rights have been previously terminated by a court.
4. If the court, after inquiry, is unable to identify an unnamed parent and no person has appeared in the proceeding claiming to be an unnamed parent of the child or to have any right of custody of the child, the court shall enter an order terminating all parental rights of the unnamed parent with reference to the child and the parent and child relationship.
5. If a petition for termination of parental rights is made by a parent of the child under this section or if a parent consents to termination of parental rights under section 27-20-44, that parent is entitled under section 27-20-26 to legal counsel during all stages of a proceeding to terminate the parent and child relationship.
6. Subject to the disposition of an appeal, upon the expiration of thirty days after an order terminating parental rights is issued under this section, the order cannot be questioned by any person, including the petitioner, in any manner, or upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of the parties or of the subject matter, unless the person retained custody of the child.

27-20-46. Effect of order terminating parental rights or appointing a legal guardian.
1. An order terminating parental rights of a parent terminates all the parent's rights and obligations with respect to the child and of the child to or through the parent arising from the parental relationship. The parent is not thereafter entitled to notice of

proceedings for the adoption of the child by another nor has the parent any right to object to the adoption or otherwise to participate in the proceedings.
2. An order appointing a legal guardian terminates any authority of a parent that is granted to the legal guardian under that order. A parent subject to such an order is entitled to treatment as a party at any subsequent juvenile court proceeding regarding the child.

27-20-47. Disposition upon termination of parental rights.
1. If, upon entering an order terminating the parental rights of a parent, there is no parent having parental rights, the court shall:
a. Commit the child to the custody of the executive director of the department of human services or a licensed child-placing agency willing to accept custody for the purpose of placing the child for adoption or, in the absence thereof, in a foster home;
b. Appoint a fit and willing relative or other appropriate individual as the child's legal guardian; or
c. Establish some other planned permanent living arrangement.
2. The custodian has the rights of a legal custodian and authority to consent to the child's adoption, marriage, enlistment in the armed forces of the United States, and surgical and other medical treatment.
3. If the child is not placed for adoption within twelve months after the date of the order and a legal guardianship or other planned permanent living arrangement for the child has not been established by a court of competent jurisdiction, the child must be returned to the court issuing the original termination order for entry of further orders for the care, custody, and control of the child.

27-20-48. Guardian ad litem. The court at any stage of a proceeding under this chapter, on application of a party or on its

own motion, shall appoint a guardian ad litem for a child who is a party to the proceeding if he has no parent, guardian, or custodian appearing on his behalf or their interests conflict with his or in any other case in which the interests of the child require a guardian. A party to the proceeding or his employee or representative may not be appointed.

27-20-48.1. Appointment of legal guardian.
1. In a proceeding under chapter 30.1-27, the court may:
a. Without terminating parental rights, appoint a fit and willing relative or other appropriate individual as the child's legal guardian if the court has determined that a lawful basis exists for terminating parental rights, but the child is unlikely to be placed for adoption; or
b. Appoint a fit and willing relative or other appropriate individual as the child's legal guardian if the child has not been placed for adoption within twelve months after a termination of all parental rights.
2. An individual appointed as a legal guardian has:
a. If there is a parent with remaining parental rights, the rights of a legal custodian; and
b. If there is no parent with remaining parental rights, the rights of a legal custodian and the authority to consent to the child's adoption, marriage, enlistment in the armed forces of the United States, and surgical and other medical treatment.

27-20-49. Costs and expenses for care of child.
1. The following expenses are a charge upon the funds of the county upon certification thereof by the court:
a. The cost of medical and other examinations and treatment of a child ordered by the court.
b. The cost of care and support of a child committed by the court to the legal custody of a public agency other than an institution for delinquent children, or to a private agency or

individual other than a parent.
c. The cost of any necessary transportation for medical and other examinations and treatment of a child ordered by the court unless the child is in the legal custody of a state agency.
2. The supreme court shall pay reasonable compensation for services and related expenses of counsel appointed by the court for a party and reasonable compensation for a guardian ad litem. The attorney general shall pay the witness fees, mileage, and travel expense of witnesses incurred in the proceedings under this chapter in the amount and at the rate provided for in section 31-01-16. Expenses of the state include the cost of any necessary transportation for medical and other examinations and treatment of a child ordered by the court if the child is in the legal custody of a state agency in which case the cost must be reimbursed to the county by that state agency at the state mileage rate, excluding meals and lodging, plus twenty-nine cents per mile.
3. If, after due notice to the parents or other persons legally obligated to care for and support the child, and after affording them an opportunity to be heard, the court finds that they are financially able to pay all or part of the costs and expenses stated in subsection 1, and expenses payable by the supreme court under subsection 2, the court may order them to pay the same and prescribe the manner of payment. Unless otherwise ordered, payment shall be made to the clerk of the juvenile court for remittance to the person to whom compensation is due, or if the costs and expenses have been paid by the county or the state to the county treasurer of the county or to the state treasurer.

27-20-50. Protective order. On application of a party or on the court's own motion the court may make an order restraining or otherwise controlling the conduct of a person if:
1. An order of disposition of a delinquent, unruly, or deprived

child has been or is about to be made in a proceeding under this chapter;
2. The court finds that the conduct (a) is or may be detrimental or harmful to the child and (b) will tend to defeat the execution of the order of disposition; and
3. Due notice of the application or motion and the grounds therefor and an opportunity to be heard thereon have been given to the person against whom the order is directed.

27-20-51. Inspection of court files and records.
1. Except as provided in this section, all files and records of the juvenile court, whether in the office of the clerk of district court or juvenile court, of a proceeding under this chapter are closed to the public. Juvenile court files and records are open to inspection only by:
a. The judge and staff of the juvenile court.
b. The parties to the proceeding or their counsel or the guardian ad litem of any party.
c. A public or private agency or institution providing supervision or having custody of the child under order of the juvenile court, which must be given a copy of the findings and order of disposition when it receives custody of the child.
d. Any court and its probation and other officials or professional staff and the attorney for the defendant for use in preparing a presentence report in a criminal case in which the defendant is convicted and who, prior to the criminal case, had been a party to the proceeding in juvenile court.
e. The professional staff of the uniform crime victims compensation program when necessary for the discharge of their duties pursuant to chapter 54-23.4.
f. A staff member of the division of children and family services of the department of human services or a law enforcement officer when necessary for the performance of that person's duties under section 50-11.1-06.2 or the National Child

Protection Act of 1993 [Pub. L. 103-209; 107 Stat. 2490; 42 U.S.C. 5119 et seq.].

g. An employee or agent of the department of human services when necessary for performance of that individual's duty under chapter 50-11 or 50-11.1 to investigate the background of an individual living or working in the facility, home, or residence for which licensure is sought.

h. A criminal justice agency if the juvenile is required to register under section 12.1-32-15.

2. Juvenile court files and records are also open to inspection with written leave of a juvenile court judge or judicial referee to whom juvenile court matters have been referred:

a. Upon a showing in writing of a legitimate interest in a proceeding or in the work of the juvenile court, but only to the extent necessary to respond to the legitimate interest; and

b. By the principal of any public or private school that is a member of the North Dakota high school activities association, or the superintendent of any school district that has one or more schools involved in the association, but only to the extent necessary to enforce the rules and regulations of the North Dakota high school activities association.

3. In a proceeding under this chapter, if the juvenile court finds that a child committed a delinquent or unruly act that constitutes a violation of a law or local ordinance governing the operation of a motor vehicle or a delinquent act of manslaughter or negligent homicide caused by the child's operation of a motor vehicle, the juvenile court shall report the finding to the director of the department of transportation within ten days.

4. Following an adjudication of delinquency for an offense that would be a felony if committed by an adult, the juvenile's school principal, chief administrative officer, or designated school guidance counselor, if requested, must be allowed access to the disposition order. Any other juvenile court files and

records of a child may be disclosed to a superintendent or principal of the school in which the child is currently enrolled or in which the child wishes to enroll if the child appears to present a danger to self or to the students or staff of the school.
5. Following an adjudication of delinquency for an offense that results in the prohibitions included in subsection 1 or 2 of section 62.1-02-01, if requested, a law enforcement officer must be allowed access to the disposition order.
6. The juvenile court may notify a referring agency of the disposition of a case.
7. Notwithstanding that juvenile court records are closed to the public, nothing in this section may be construed to limit the release upon request of general information not identifying the identity of any juvenile, witness, or victim in any proceeding under this chapter. Files in the clerk of court's office are open to public inspection if the related hearing was open to the public under section 27-20-24.

27-20-51.1. Disclosure of information needed to apprehend juvenile.
Notwithstanding any other provision of law, the name, photographs, fingerprints, or other identifying information of a juvenile who is alleged to have committed a delinquent act involving actual or threat of serious bodily injury that would constitute a felony if committed by an adult or who has escaped or left without authorization from a secure facility may be released by law enforcement, the division of juvenile services, or the juvenile court for purposes of apprehending the juvenile.

27-20-52. Law enforcement and correctional facility records.
Law enforcement and correctional facility records and files of a child alleged or found to be delinquent, unruly, or deprived must be kept separate from the records and files of arrests of adults. Unless a charge of delinquency is transferred for

criminal prosecution under section 27-20-34, the interest of national security requires, or the court otherwise orders in the interest of the child, these records and files may not be open to public inspection; but inspection of these records and files is permitted by:

1. A juvenile court having the child before it in any proceeding;
2. Counsel for a party to the proceeding;
3. The officers of public institutions or agencies to whom the child is or may be committed;
4. Law enforcement officers of other jurisdictions when necessary for the discharge of their official duties;
5. A court in which the child is convicted of a criminal offense for the purpose of a presentence report or other dispositional proceeding, or by officials of correctional facilities to which the child is detained or committed, or by the parole board, the governor, or the pardon advisory board, if one has been appointed, in considering the child's parole or discharge or in exercising supervision over the child;
6. The professional staff of the uniform crime victims compensation program when necessary for the discharge of their duties pursuant to chapter 54-23.4; and
7. A superintendent or principal of the school in which the child is currently enrolled or of a school in which the child wishes to enroll.

Notwithstanding that law enforcement records and files of a child alleged or found to be delinquent, unruly, or deprived are not open to public inspection, nothing in this section may be construed to limit the release of general information not identifying the identity of the child.

27-20-52.1. Law enforcement data base. Repealed by S.L. 1999, ch. 131, § 2.

27-20-53. Children's fingerprints, photographs.

1. No child under fourteen years of age may be fingerprinted in the investigation of a crime except as provided in this section. Fingerprints of a child who is referred to the court may be taken and filed by law enforcement officers in investigating the commission of the following crimes: murder, manslaughter, gross sexual imposition, robbery, aggravated assault, burglary, theft, forgery, and unlawful possession or use of a handgun.
2. Fingerprint files of children must be kept separate from those of adults. Copies of fingerprints known to be those of a child may be maintained locally and copies may be sent to a central state depository but may not be sent to a federal depository unless needed in the interest of national security.
3. Fingerprint files of children may be inspected by law enforcement officers when necessary for the discharge of their official duties. Other inspections may be authorized by the court in individual cases upon a showing that it is necessary in the public interest.
4. Fingerprints of a child are considered a part of the child's juvenile or adult investigative file and must be removed from the state and local files and destroyed in accordance with section 27-20-54.
5. If latent fingerprints are found during the investigation of an offense and a law enforcement officer has probable cause to believe that they are those of a particular child, the officer may fingerprint the child regardless of age or offense for purposes of immediate comparison with the latent fingerprints. If the comparison is negative, the fingerprint card and other copies of the fingerprints taken must be immediately destroyed. If the child is not referred to the court, the fingerprints must be immediately destroyed.
6. A child may be photographed by a law enforcement officer at the time of arrest for the crimes of murder, manslaughter, gross sexual imposition, robbery, aggravated assault, burglary, theft, forgery, or unlawful possession or use of a handgun. The

photograph must be destroyed if the child is not referred to the juvenile court. If a court finds facts that would justify a finding that a child at least fourteen years of age at the time of the offense is delinquent and the finding involves the unlawful use or possession of a handgun or the commission of an act proscribed by the criminal laws of this state and punishable as a felony or a class A misdemeanor committed for the benefit of, at the direction of, or in association or affiliation with any criminal street gang, with the intent to promote, further, or assist in the activities of a criminal gang, the juvenile court shall order upon the request of the state's attorney the taking and retention of a photograph of the child for purposes of identification. Photographs of children under this subsection may be maintained on a local basis and sent to a central state depository but must be maintained separate from those of adults and must be destroyed in accordance with section 27-20-54.

27-20-54. Destruction of juvenile court records.
1. All juvenile court records must be maintained pursuant to rules and procedures established by the North Dakota supreme court.
2. Upon the final destruction of a file or record, the proceeding must be treated as if it never occurred. All index references, except those which may be made by the director of the department of transportation, must be deleted, and upon inquiry in any matter the child, the court, law enforcement officers, and representatives of agencies, except the director of the department of transportation, shall properly reply that no record exists with respect to the child. The juvenile court shall notify each agency or official therein named. Each law enforcement agency and law enforcement officer except the director of the department of transportation, upon receipt of a copy of the order, shall destroy all files, records, and references to the child pertaining to his apprehension, detention, and referral to the

juvenile court and any record of disposition made by the juvenile court.

27-20-54.1. Destruction of juvenile records and files - Certain types of records excepted. Repealed by S.L. 1979, ch. 366, § 2.

27-20-55. Contempt powers. The court may punish a person for contempt of court under chapter 27-10.

27-20-56. Appeals.
1. An aggrieved party, including the state or a subdivision of the state, may appeal from a final order, judgment, or decree of the juvenile court to the supreme court by filing written notice of appeal within thirty days after entry of the order, judgment, or decree, or within any further time the supreme court grants, after entry of the order, judgment, or decree. The appeal must be heard by the supreme court upon the files, records, and minutes or transcript of the evidence of the juvenile court, giving appreciable weight to the findings of the juvenile court. The name of the child may not appear on the record on appeal.
2. The appeal does not stay the order, judgment, or decree appealed from, but the supreme court may otherwise order on application and hearing consistent with this chapter if suitable provision is made for the care and custody of the child. If the order, judgment, or decree appealed from grants the custody of the child to, or withholds it from, one or more of the parties to the appeal, it must be heard at the earliest practicable time.

27-20-57. Rules of court. The supreme court of this state may adopt rules of procedure not in conflict with this chapter governing proceedings under it.

27-20-58. Uniformity of interpretation. Repealed by S.L. 1983, ch. 82, § 154.

27-20-59. Short title. This chapter may be cited as the Uniform Juvenile Court Act.

(3)

No. 03-784

OFFICE OF THE CLERK

In The

Supreme Court of the United States

NOREAN HOOTS, L.S.W. of Cass County Social Services, and MONTY MERTZ, Guardian Ad Litem, on behalf of A.B., a Child,

Petitioners,

v.

K.B., F.B., and TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of North Dakota

RESPONDENT TRIBE'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The North Dakota Supreme Court affirmed a decision of a juvenile trial court transferring jurisdiction over a termination of parental rights proceeding involving an Indian child to the Turtle Mountain Tribal Court under the provisions of the Indian Child Welfare Act, 25 U.S.C. §1911(b). The Petitioner contended that the trial court's transfer of jurisdiction violated the Indian Child Welfare Act because the transfer request was untimely and because the application of the Indian Child Welfare Act to the minor child, A.B., violated the child's due process and equal protection rights, and the Tenth Amendment to the United States Constitution. United States Constitution, Amendment's XIV and X. The Petitioner also argued that the Indian Child Welfare Act should not have been applied to A.B., even though she is an Indian child, as defined at 25 U.S.C. §1903(4), who lived most of her life with her parents and Indian grandmother, because of the "Existing Indian Family Exception", a judicially-created exception to the federal law.

1. Whether an Indian child's right to due process of law and equal protection is violated when a state court transfers jurisdiction over a proceeding seeking to terminate the parental rights of that child's parents to the Tribal Court of the Tribe where the child is eligible for membership?

2. Whether a challenge to the constitutionality of the Indian Child Welfare Act, a law premised upon the especial relationship between Indian tribes and the United States government, should be gauged utilizing a strict scrutiny analysis when this Court has rejected such an analysis to legislation affecting Indians for almost two centuries.

QUESTIONS PRESENTED – Continued

3. Whether the North Dakota Supreme Court's rejection of the "Existing Indian Family Exception", a judicially-created exception to the Indian Child Welfare Act that has been and rejected by a majority of state courts to address it, warrants this Court's granting the petition in this case.

4. Whether the Petitioner can challenge the Indian Child Welfare Act, as infringing upon state authority under the Tenth Amendment to the United States Constitution, when the State of North Dakota has voluntarily acceded to the requirements of that federal law by accepting monies under the Social Security Act, 42 U.S.C. §622(11).

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

The Petitioner correctly identifies the parties in her petition. The Turtle Mountain Band of Chippewa Indians is a federally recognized Indian tribe and is not a corporate entity.

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JURISDICTIONAL STATEMENT

The Respondent does not take issue with the jurisdictional statement of the Petitioner.

STATEMENT OF THE CASE

The Respondent takes issue with several assertions in the Petitioner's statement of the case. The Turtle Mountain Band of Chippewa Indians was not notified of the foster care placement of A.B. in March of 2001. Instead, the record before the Court below revealed that the Petitioner sent notice to the Turtle Mountain Tribal Court, and not the Tribe as required by 25 U.S.C. §1912(a), and the Tribe did not learn of the pendency of the proceedings involving A.B. until the grandmother, H.L., a member of the Turtle Mountain Band of Chippewa Indians, sought the Tribe's help to regain the custody of her grandchild in October of 2001. The Petitioner had placed A.B. with her Indian grandmother in March of 2001 after removal from her mother. H.L. already possessed, at that time, a Turtle Mountain Tribal Court order giving her custody of A.B. from 1995. When the grandmother sought some respite from caring for A.B. in October of 2001 because of some personal problems she was experiencing, the Petitioner removed A.B. and refused to return the child to her even after she contacted the Petitioner almost immediately and requested a return of custody. The grandmother then contacted the Tribe in October of 2001 and the Tribe began intervening on behalf of A.B.

The Tribe attempted to transfer jurisdiction of the proceedings in the state court when it was a foster care proceeding in January of 2002, but the mother, K.B.,

objected to the transfer of jurisdiction and the North Dakota District Court properly retained jurisdiction. However, after the Petitioner sought to terminate the parental rights of A.B.'s parents and refused to consider placement with the child's grandmother, even though she was an eligible relative placement under 25 U.S.C. §1915(a), the Tribe renewed its request to transfer jurisdiction and both parents concurred with the transfer request. The Petitioner objected to the transfer and argued that the transfer request was untimely and that the tribal court would be an inconvenient forum for the parties, notwithstanding the Tribal Court's agreement to conduct proceedings in Fargo, North Dakota if necessary. The Petitioner also asserted that the application of ICWA to A.B. was improper because she was not removed from an "Existing Indian Family Exception" and because the transfer of jurisdiction would be contrary to her best interest. The Referee barred evidence on the latter issue finding that it was irrelevant on the procedural issue of transfer.

The Petitioner also attempted to argue to the Referee that the application of the Indian Child Welfare Act to A.B. was unconstitutional because A.B. had never resided in an "Indian Family" and should not therefore be considered "Indian", relying upon a California Court of Appeals decision, *In re Santos Y.*, 92 Cal. App. 4th 1274, 112 Cal. Rptr. 2d 692 (Cal. App. 2d Dist. 2001). A Judicial Referee ruled that the transfer request was untimely and the Turtle Mountain Tribal Court would be an inconvenient forum because she erroneously believed that the Tribe, by filing both a motion to transfer and dismiss the state court proceedings, did not intend to provide for the care of A.B. The Referee did not reach the constitutional challenges to the Indian Child Welfare Act, indicating to the Parties

that they did not need to respond to the constitutional issues because she did not intend to rule upon them. The Tribe requested review before a North Dakota District Court Judge who reversed the Referee and concluded that the Tribe's request to transfer was not untimely and that the Tribal Court would not be an inconvenient forum. The District Court ruled that the constitutional issues were not before it and therefore declined to rule on them. The Petitioner then sought review of the order transferring jurisdiction to the North Dakota Supreme Court.

The North Dakota Supreme Court affirmed the District Court decision in a unanimous opinion in which the Court rebuffed the Petitioner on a number of arguments, including the constitutional arguments she raised. The Court held that the Tribe's motion to transfer jurisdiction, filed approximately six weeks after the petition to terminate parental rights was filed and before any evidentiary hearing on the petition, was not untimely and that the tribal court was not an inconvenient forum because none of the witnesses indicated an inability to appear in the Tribal Court and the Court expressed a willingness to sit in Fargo, North Dakota. The Court also rejected the argument that the District Court should have determined whether the Tribal Court would act in the best interest of the child before deciding to transfer jurisdiction.

The Court also, noting its jurisdiction on appeals from Juvenile Court decisions was de novo, proceeded to address the constitutional issues raised by the Petitioner. The Court rejected the California Court of Appeal's analysis in *In Re Santos Y.*, 92 Cal. App. 4th 1274, 112 Cal. Rptr. 2d 692 (Cal. App. 2d Dist. 2001) finding that the "Existing Indian Family Exception" was a deviation from

the clear language of Congress and permitted state courts to undermine a Tribe's interest in its children. The Court also noted that the child in the *Santos* case had lived almost exclusively in California with his parents who had few or no ties to the child's Tribe in Minnesota, while A.B. lived with both her parents and her grandmother, who was an enrolled member of the Turtle Mountain Band of Chippewa Indians. The Court, relying upon a plethora of decisions issued by this Court, found that allowing A.B's tribe to determine her placement did not violate her rights to equal protection under the law. Lastly, the Court held that Indian Child Welfare Act did not violate the Tenth Amendment to the United States Constitution because it was a proper exercise of congressional authority under the Indian commerce clause, United States Constitution, Art. I, §8. The Tribe had also contended to the Court below that the State voluntarily acceded to complying with the standards of the Indian Child Welfare Act by accepting funding under Title IV-B of the Social Security Act. *See* 42 U.S.C. §622(11).

The Petitioner sought rehearing before the North Dakota Supreme Court, but did not seek a stay of the order transferring jurisdiction. A.B. is now within the exclusive jurisdiction of the Turtle Mountain Tribal Court and has been placed with a relative who is providing excellent care for her. A.B. is now a ward of the Tribal Court under 25 U.S.C. §1911(a) and there is no method for her to be transferred back to the jurisdiction of the North Dakota state courts.

ARGUMENT AGAINST GRANTING THE PETITION IN THIS CASE

The petition for a writ of certiorari should be denied in this case because no active case or controversy continues to exist because A.B. is now within the exclusive jurisdiction of the Turtle Mountain Tribal Court and no legal method exists for the North Dakota state courts to regain any jurisdiction over her. Even if an active case or controversy exists, the North Dakota Supreme Court's decision does not conflict with any rulings of this Court regarding the Indian Child Welfare Act, nor does it conflict with other state courts of last resort regarding the application of the Indian Child Welfare Act. Merely because the North Dakota Supreme Court rejected the aberrant ruling of a California Court of Appeals, which decision is a minority perspective even in the California courts, does not warrant this Court reviewing this matter. Lastly, the North Dakota Supreme Court followed centuries of precedents from this Court finding that Congress has the authority to regulate the affairs of Indian persons without running afoul of the equal protection clause of the Fifth Amendment to the United States Constitution, United States Constitution, Amendment V, or of the Tenth Amendment, United States Constitution, Amendment X, when it upheld the constitutionality of the Indian Child Welfare Act.

A. The North Dakota Supreme Court's Decision Below Does Not Impair Any Due Process or Equal Protection Rights of A.B.

The Petitioner argues that by allowing A.B.'s Tribe to decide her future placement and whether to terminate the parental rights of her parents, the North Dakota Supreme Court violated A.B's substantive due process right to a

"safe and permanent placement". The petitioner does not explain where this right is derived, or why having a Tribal Court decide this issue, rather than a state court, would impair this right. Congress passed the Indian Child Welfare Act in 1978 in an effort to reduce the numbers of Indian children placed in foster care outside their extended families and Tribes. The law is also designed to encourage tribal decision-making in child custody proceedings involving Indian children by compelling state courts to transfer jurisdiction over "foster care placement or termination of parental rights" proceedings to tribal courts, absent objection by either parent or a showing of good cause to the contrary. 25 U.S.C. §1911(b).[1] The jurisdictional provisions of the Indian Child Welfare Act were described by this Court to be at "the heart of" the Act and are designed to create "presumptive jurisdiction" in the tribal court over proceedings that are commenced initially in state courts. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 35-36, 109 S.Ct. 1597, 104 L.Ed. 2d 29 (1989).

This Court has already rejected the argument that the Indian Child Welfare Act's jurisdictional provisions, contained at 25 U.S.C. §1911, infringe upon the due

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[1] That subsection reads:

"In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe".

process rights of Indian children. In the face of a similar argument made in the *Holyfield* case to permitting a tribal court to resolve a dispute over the custody of Indian twins, this Court held:

> "Whatever feelings we might have as to where the twins should live . . . it is not for us to decide that question. We have been asked to decide the legal question of who should make the custody determination regarding these children – not what that decision should be. The law places that in the hands of the Choctaw court".

Mississippi Band Choctaw Indians v. Holyfield, 490 U.S. 30, 53 (1989).[2]

Similarly, in the case below the Court did not find that the need of A.B. for a safe and permanent home was irrelevant, but only that the Turtle Mountain Tribal Court should be the forum to decide the child's placement. Ironically, the Petitioner relies upon decisions such as *Santosky v. Kramer*, 455 U.S. 745, 753 (1982), regarding the right of a child to maintain "familial relationships", as the constitutional basis for this amorphous due process right of A.B., in a case where Petitioner herself was attempting to terminate the child's relationship with her parents and her grandmother and place the child with a non-family member. Apparently, the Petitioner believes that by transferring jurisdiction of the termination of

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[2] Even though *Holyfield* involved a question of exclusive jurisdiction under §1911(a) and not transfer of jurisdiction, it is apparent that the same analysis would apply to a transfer of jurisdiction as that only involves considerations of who makes a decision about a child, not what decision should be made.

parental rights proceeding to the tribal court, thereby denying her the chance to terminate A.B.'s parents' rights, the District court denied A.B. her due process rights. None of the cases she cites in support of this proposition even suggest this, as this would incredulously result in every denial of a termination of parental rights petition rising to the level of a due process violation.

The Tribe, by expressing concern about the Petitioner's apparent unwillingness to consider placement of A.B. with her Indian grandmother and by transferring jurisdiction over the proceeding, was acting to preserve A.B.'s ties to her family in a manner that was more consistent with her due process rights. *See Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977) (city zoning ordinance prohibiting more than one grandchild from living with grandmother infringed upon the due process rights of extended family members to reside together). Although couched in terms of A.B.'s due process rights, it is apparent that the Petitioner's objection to the transfer of jurisdiction does not concern A.B.'s rights, but instead Petitioner's perceived right to decide A.B.'s future placement. There is no such due process right that this Court or any state court of last resort has recognized.

The Petitioner relies heavily upon a California Court of Appeals decision, *In re Santos Y.*, 92 Cal. App. 4th 1274, 112 Cal. Rptr. 2d 692 (Cal. App. 2d Dist. 2001), in support of many of her constitutional challenges to the decision below. The *Santos Y.* decision is not a decision of the California Supreme Court and certiorari would not lie to review the decision below under Supreme Court Rule 10(b). It should also be noted that the decision in *Santos Y.* is not the opinion of all of the appellate districts in California. In *Santos Y.* the California Court of Appeals held

that the Indian Child Welfare Act, in order to preserve its constitutionality, could not be applied to an Indian child who lived in a home with parents who had been assimilated and did not maintain significant ties to an Indian tribe. It should be noted that the California Courts of Appeal are divided on the issue of whether the federal law should apply to all Indian children and the California Supreme Court has refused thus far to resolve the conflicts among the Courts of Appeal there. *Cf. In re Alexandria Y.*, 45 Cal. App. 4th 1483, 53 Cal. Rptr. 2d 679 (Cal. App. 4th Dist. 1996) (accepting doctrine); *Crystal R. v. Superior Court*, 59 Cal. App. 4th 703, 69 Cal. Rptr. 2d 414 (Cal. App. 6th Dist. 1997) (accepting doctrine); *In re Derek W.*, 73 Cal. App. 4th 828, 86 Cal. Rptr. 2d 742 (Cal. App. 2d Dist. 1999) (accepting the doctrine); *In re Bridget R.*, 41 Cal. App. 4th 1483, 49 Cal. Rptr. 2d 507 (Cal. App. 2d Dist. 1996) (accepting the doctrine); *In re Alicia S.*, 65 Cal. App. 4th 79, 76 Cal. Rptr. 2d 121 (Cal. App. 5th Dist. 1998) (rejecting the argument); *In re Adoption of Lindsay C.*, 229 Cal. App. 3d 404, 280 Cal. Rptr.194 (Cal. App. 1st Dist. 1991) (rejecting the argument); *In re Crystal K.*, 226 Cal. App. 3d 655, 276 Cal. Rptr. 619 (Cal. App. 3d Dist. 1990) (rejecting the argument).

The California legislature attempted to curtail judicial attempts to modify the federal definition of Indian child in 1999 by enacting §§7810(a) of the California Family Code and 360.6 of the Welfare and Institutions Code, yet this has not prevented some California courts, including the Santos Y. court, from continuing to embrace the exception when they see fit. This appears to be a California phenomenon, however, as the majority of other state courts, including the North Dakota Supreme Court below, have upheld the constitutionality of the federal law. *See In re Marcus*, 638 A.2d 1158 (Me. 1994); *In re D.L.L. and C.L.L.*, 291 N.W.2d 278 (S.D. 1980); *In re Appeal of Pima County*

Juvenile Action S-903, 635 P.2d 187 (Ariz. App. 1981), *cert. denied*, 455 U.S. 1007 (1982); *Matter of Miller*, 182 Mich. App. 70, 451 N.W.2d 576 (1990); *State ex rel. CSD v. Graves*, 848 P.2d 133 (Or. App. 1993). A majority of other state courts have rejected the attempt to distinguish between Indian children based upon whether they really possess ties to the Indian tribe where they are members of or eligible for membership in. *See Matter of Adoption of Riffle*, 922 P.2d 510 (Mont. 1996); *Matter of Adoption of Baade*, 462 N.W.2d 485 (S.D. 1990); *Burks and Burks v. Arkansas Department of Human Services*, 76 Ark. App. 71, 61 S.W.3d 184 (2001); *Michael J. v. Michael J.*, 7 P.3d 960 (Ariz. App. 2000); *J.W. v. R.J.*, 951 P.2d 1206 (AK. 1998); *In Re Adoption of Baby Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988); *Matter of Baby Boy Doe*, 849 P.2d 925 (Idaho 1993); *In re Adoption of S.S.*, 622 N.E.2d 832 (Ill. App. 1993); *In re Oscar C.*, 559 N.Y.S. 2d 431 (Fam. Ct. 1990); *In re Elliott*, 554 N.W.2d 32 (Mich. 1996); *Utah in Interest of D.A.C.*, 933 P.2d 993 (Utah App. 1997).

The Court's sound ruling below does not deviate from any federal court of appeals or state court of last resort on this issue. The cases from state courts of last resort cited by the Petitioner involved Indian children who never resided with an Indian caretaker, *Matter of Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982), *Matter of Adoption of Crews*, 825 P.2d 305 (Wash. 1992), *Matter of S.C.*, 833 P.2d 1249 (Ok. 1992),[3] or who were the subject of private

[3] It should also be noted that the Oklahoma legislature overturned the "Existing Indian family exception" utilized in this case by enacting Okla. Stat. Ann. Tit. 10, 40.3 in 1995.

custody disputes, *see Rye v. Weasel*, 934 S.W.2d 257 (Ky. 1996), whereas this case involves an Indian child who lived much of her life with her Indian grandmother, who had received custody of her in 1995 from a tribal court.

The Petitioner also urges this Court to grant certiorari because the decision below allegedly violates A.B.'s rights to equal protection under the law. Again, the Petitioner fails to cite one federal decision or decision from a state court of last resort holding that the Indian Child Welfare Act violates equal protection of the laws or should be subject to a strict scrutiny test. To the contrary, this Court's precedents over the past two centuries have recognized that legislation Congress enacts to benefit Indian tribes and persons, or to harm them, do not involve impermissible racial classifications, but instead involve political decisions within the exclusive realm of Congress because of the trust relationship Indian tribes have with the federal government. See e.g., *United States v. Kagama*, 118 U.S. 375 (1886) (Congress has plenary authority to enact federal statutes subjecting Indians to federal criminal jurisdiction); *Choctaw Nation v. United States*, 119 U.S. 1 (1886); *United States v. Pelican*, 232 U.S. 442 (1914); *Seminole Nation v. United States*, 316 U.S. 286 (1942); *United States v. Creek Nation*, 295 U.S. 103 (1935); *Tulee v. Washington*, 315 U.S. 681 (1942).

This trust relationship is derived from Article I, §8, cl. 3, which provides Congress with the power to "regulate Commerce . . . with the Indian tribes". This can result in distinct legislation for Indian tribes and persons that both benefits them, and on occasion harms their interests. *See Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (Congress has plenary authority over Indian lands and can force allotment of those lands even over objection of individual

Indians); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (Congress can diminish reservation by legislative fiat).

As this Court stated in *United States v. Antelope*, 430 U.S. 641 (1977) in response to an argument by an Indian criminal defendant that his equal protection rights were violated because he was subject to more punitive federal, rather than state law:

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.

Antelope, at 645.

The Petitioner's argument that this Court's decisions upholding congressional authority to legislate in the area of Indian affairs only permits it to legislate for Indian tribes and not individual Indians is not supported by any precedent of this Court. In *Morton v. Mancari*, 417 U.S. 535 (1974) this Court upheld a limited employment preference law for the benefit of individual Indians working for the Bureau of Indian Affairs. In *Morton*, this Court rejected the strict scrutiny analysis for the Indian preference program because the distinctions drawn by the statute were not based upon race, but instead the unique trust relationship the United States had toward Indian tribes and individual Indians. *Morton*, at 554. Even more fatal to the argument of the Petitioner that A.B. was denied equal protection because her case was transferred to the jurisdiction of a tribal court, rather than retained in the state

court, is this Court's decision in *Fisher v. District Court*, 424 U.S. 382 (1976) wherein, in the face of an argument that an Indian family was denied equal protection because a state court had no jurisdiction to enter a decree of adoption over an Indian child, it was held that the "exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe". *Fisher*, at 390. Similarly, in this case, the transfer of jurisdiction over the proceedings involving A.B. to the Turtle Mountain Tribal Court was not the result of A.B's race, but instead was the result of the right of the Turtle Mountain Tribe to provide for its children under federal law.

The Tribe acknowledges that A.B. is entitled to due process of law and the equal protection of the law in North Dakota state courts. She was not denied that by the North Dakota courts. Congress has decided, however, that she is entitled to more protections, not less, because of her status as an Indian child and those protections include the right to be raised in a home that reflects her unique culture and heritage. Giving her more protections in an effort to preserve the unique cultural identity of Indian tribes and Indian families is an appropriate exercise of congressional authority. *See In re Marcus*, 638 A.2d 1158 (Me. 1994); *In re D.L.L. and C.L.L.*, 291 N.W.2d 278 (S.D. 1980); *In re Appeal of Pima County Juvenile Action S-903*, 635 P.2d 187 (Ariz. App. 1981), *cert. denied*, 455 U.S. 1007 (1982); *Matter of Miller*, 182 Mich. App. 70, 451 N.W.2d 576 (1990); *State ex rel. CSD v. Graves*, 848 P.2d 133 (Or. App. 1993).

The Petitioner's reliance upon *Gratz v. Bollinger*, 123 S.Ct. 2411 (2003) is misplaced because that case involved an equal protection challenge brought by students who

claimed they were denied rights because of **state** college admissions policies skewed toward minority students, including Indians. There were no federal laws or policies that gave Indian students more rights involved in *Gratz* and the issue was exclusively whether state educational institutions could treat individual students differently. As this Court held in *Washington v. Confederated Bands & Tribes of the Yakima Nation*, 439 U.S. 463, 500-502 (1979):

> It is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive. . . . States do not enjoy this same unique relationship with Indians.

This Court did not repudiate its analysis in *Morton v. Mancari* in *Gratz* and did not analyze whether federal laws specifically legislating for Indian tribes and persons involved invidious racial discrimination. It should be noted that even the United States Department of Education, Office of Indian Education, is directed by Congress to give a "preference to Indian persons in all personnel actions in the Office". 20 U.S.C. §3423c(c). Even if laws such as the Indian Child Welfare Act were subject to a heightened level of scrutiny than the rational basis test utilized by the North Dakota Supreme Court, it is very dubious that a state agency may assert an alleged equal protection violation on behalf of a child who allegedly is receiving more rights than a non-Indian child similarly situated. A state agency does not experience an injury in fact sufficient to confer standing under *Powers v. Ohio*, 499 U.S. 400, 411 (1991) when its only "loss" is the right to attempt to terminate the parental rights over an Indian child. Similarly, an Indian child who gains the extra protections

of the Indian Child Welfare Act cannot point to an injury in fact sufficient to confer standing upon the child's guardian ad litem or state agency allegedly acting on her behalf. Only those persons who can demonstrate that they have been denied a right provided an Indian child or Tribe would appear to have standing to assert an equal protection violation.

This Court should deny the petition for a writ of certiorari requesting review of the North Dakota Supreme Court's rejection of the "Existing Indian Family Exception" and the Court's refusal to follow an aberrant California Court of Appeals decision that ignores centuries of precedents from this Court recognizing congressional authority to legislate for Indian tribes and persons without implicating the equal protection rights of Indians or others.

B. The North Dakota Supreme Court's Interpretation of the Indian Child Welfare Act Is Not Violative of Federal Law

The Petitioner asserts that the North Dakota Supreme Court's decision affirming a District Court order transferring jurisdiction over a parental rights termination proceeding to the Tribal Court was so egregious that this Court's attention is merited. This argument is baseless. The North Dakota Supreme Court's decision comports with federal law in all respects and is on all fours with a majority of State Supreme Court decisions addressing these issues. The Court correctly affirmed a reversal of a Judicial Referee's decision which, among other things, held that a motion to transfer jurisdiction to a Tribal Court should not be granted because the State court would be inconvenienced by having to dismiss its case and that the family involved was "Indians by genetics only". Because

the Indian Child Welfare Act is a federal law that applies solely in state courts there are naturally going to be differences of opinion among the different states on the meaning of the law in different contexts. This Court's certiorari jurisdiction is not appropriate to determine if a state court complied with BIA guidelines or appeared too deferential to tribal concerns, as the Petitioner contends in her petition. The Petitioner does not point to one contrary decision from this Court, a federal appeals court, or a state court of last resort, when she argues at pages 19-21 of her petition that the North Dakota Supreme Court's decision on the timeliness of the motion to transfer and its decision that the Tribal Court was not an inconvenient forum was erroneous. Nor does she point out any overriding federal interest or conflict within the Courts when she contends that the mother's previous objection to a transfer of jurisdiction of the foster care proceeding to the Tribal Court should have barred a request to transfer the termination of parental rights proceeding. This Court's jurisdiction should not be invoked to resolve issues such as these.

C. A State's Rights Under the Tenth Amendment Are Not Violated When It Accepts Federal Monies In Exchange for Complying With Federal Child Welfare Laws and Policies. Congress Has Not Exceeded Its Authority By Enacting the Indian Child Welfare Act

The North Dakota Supreme Court also rejected the Petitioner's argument that Congress exceeded its authority and infringed upon the State's rights under the Tenth Amendment when it enacted the Indian Child Welfare Act and applied it to the states when they care for "deprived

children". The Court's ruling was correct on several fronts and does not conflict with precedents of this Court.

Without a doubt, Congress has enacted much legislation that compels States to comply with certain standards when dealing with deprived children. Most of these laws are codified at Title IV-B, 42 U.S.C. §§620 et seq., and Title IV-E of the Social Security Act, 42 U.S.C. §§670 et seq., and do directly interject into an area historically left to exclusive state authority – child protection. Recently, for example, Congress mandated that States enact laws denying reunification services to parents of deprived children in certain circumstances that Congress found were aggravating as part of the Adoption and Safe Families Act, Pub. L. 105-89, 111 STAT. 2115, codified in part at 42 U.S.C. 671, at §671(a)(15)(D).

Congress also mandates that all States, as a condition of the receipt of monies under Title IV-B of the Social Security Act, have a plan for child welfare services that includes the "specific measures taken by the State to comply with the Indian Child Welfare Act" after consultation with the Tribes in that State. 42 U.S.C. §622(11). North Dakota receives monies under Title IV-B of the Social Security Act and the Petitioner in this case represents a County that receives those Title IV-B monies from the State.

Notwithstanding their intrusion into the area of child protection, these laws do not violate the Tenth Amendment because States voluntarily accede to federal standards in exchange for federal monies. *See Oklahoma v. United States Civil Service Commission*, 330 U.S. 127 (1947) (Tenth Amendment not violated when Congress, as an exercise of its spending power, requires States to comply

with Hatch Act by the receipt of federal highway funds); *see also Florida v. Matthews*, 526 F.2d 319 (5th Cir. 1976) (HHS regulation governing licensure of nursing homes not violative of the Tenth Amendment because states voluntarily accede to federal requirements by accepting monies under Medicaid program). The Petitioner herein cannot accept federal monies with the promise of complying with the federal Indian Child Welfare Act and then complain that the law violates the State's rights and is an unauthorized extension of federal authority. *See Steward Machine Co. v. Davis*, 301 U.S. 548, 595 (1937) (stating that the Tenth Amendment's State sovereignty is not abridged when the States have a choice to reject federal funds and not be bound by federal law).

However, conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs. *See Massachusetts v. United States*, 435 U.S. 444, 461 (1978). The purpose behind ICWA is the preservation of the Indian family and Indian child – clearly a federal interest and a national project for Congress. *See In re Angus*, 655 P.2d 208, 213 (Or. App. 1982) (finding that the integrity of Indian families to be a permissible goal that is rationally tied to the fulfillment of Congress' unique guardianship obligation toward the Indians and that the ICWA is therefore not unconstitutional). It is completely legitimate for Congress to compel States to follow ICWA guidelines as a condition for the receipt of Federal monies, since the purpose behind the enactment of ICWA reflects a federal interest with a national scope. As Congress stated when it enacted the Indian Child Welfare Act:

> There is no resource that is more vital to the continued existence and integrity of Indian tribes

> than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or eligible for membership in an Indian tribe.

25 U.S.C. §1901(3).

The Petitioner argues that Congressional authority to regulate commerce with Indian tribes does not extend to legislating in the area of family and tribal preservation. The Court need not decide this issue because the State of North Dakota has voluntarily acceded to complying with the Indian Child Welfare Act through acceptance of federal monies under Title IV-B of the Social Security Act, enacted by Congress pursuant to its spending powers.

Even if it were an issue, however, the North Dakota Supreme Court's decision is loyal to centuries of precedents from this Court finding that the federal government's relations with Indian tribes are uniquely within the realm of Congress' power and should not be disturbed by the Courts. *See United States v. Mazurie*, 419 U.S. 554, 557 (1975) (Indian commerce clause broad enough to vest Congress with exclusive authority to regulate the sale of alcoholic beverages to tribal Indians wherever situated or into Indian country); *United States v. Kagama*, 118 U.S. 375 (1886) (plenary authority of Congress to regulate Indian affairs sufficiently broad to permit Congress to criminalize conduct by Indians in Indian country); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

This trust relationship between Congress and Indian tribes is constitutionally reflected in the Indian commerce clause of the United States Constitution, Article I, §8, but is not exclusively a product of that clause. So, for example, this Court upheld federal statutes vesting the federal

courts with criminal jurisdiction over Indians, including Indians who were not members of an Indian tribe, even though the Court acknowledged that the Indian commerce clause did not seem to grant such authority to Congress. *Kagama*, at 379. The Indian preference in employment laws for the Bureau of Indian Affairs did not touch upon Indian commerce, but were nonetheless upheld as reasonably designed to further the cause of Indian self-government". *Morton v. Mancari*, at 554. The Petitioner's analysis of the Indian commerce clause as being the exclusive basis for congressional enactments of legislation that treat Indian tribes and persons uniquely is therefore flawed and her contention that children are not commerce is too simplistic considering the almost two centuries of this Court's precedents involving congressional regulation of Indian affairs and persons.

Nor is the fact that A.B. was not an enrolled member of the Turtle Mountain Band of Chippewa Indians at the time the termination of parental rights proceeding was commenced a bar to the application of federal law to her. The definition of Indian child under the Indian Child Welfare Act includes those children who are eligible for membership in an Indian tribe and whose parent is a member of an Indian tribe. 25 U.S.C. §1903(4). Although this definition is perhaps more expansive than other definitions of "Indian" found in other federal laws, it serves an important interest of Congress – to provide protection for young Indian children who were too young to have become members of an Indian tribe when attempts were made to remove them from their families and Tribes.[4]

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[4] For example, the House of Representatives observed that in Minnesota, prior to the enactment of the Indian Child Welfare Act, one

(Continued on following page)

Such definitions of Indian are not unusual and do not defeat congressional attempts to apply the especial laws applicable to Indian persons. For example, federal laws vesting federal jurisdiction over certain crimes committed by or against Indians in Indian country, *see* 18 U.S.C. §1151, utilize a definition of "Indian" adopted by this Court in *United States v. Rogers*, 45 U.S. (4 How) 567 (1846) which does not turn upon membership in an Indian tribe, but instead requires some affiliation with an Indian tribe and some degree of Indian blood. The federal laws upheld in *Kagama* were based upon the plenary relationship of the federal government toward Indian tribes and did not turn solely upon whether a particular Indian was a member of an Indian tribe. *See* 18 U.S.C. §1153. A.B. is therefore clearly an Indian who is entitled to the extra protections of congressional enactments including the Indian Child Welfare Act.

D. Granting Certiorari In The Instant Case Would Not Resolve An Active Dispute

Because the Petitioner did not seek a stay of the North Dakota Supreme Court decision, the Turtle Mountain Tribal Court has already transferred jurisdiction over A.B. to its Court system and has therefore been vested with exclusive jurisdiction over her under 25 U.S.C.

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out of every four Indian children under the age of one was adopted out to non-Indian families. H.R. Rep. No. 1386, 95th Cong. 2d Sess. (1978), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 7530. Because of tribal requirements for enrollment to establish membership, many of these children were too young to have been enrolled with their Tribes prior to the actions being taken to remove them from their families and Tribes.

§1911(a) because she is now a ward of the Tribal Court. The Tribal Court had been exercising jurisdiction over her since 1995 when the grandmother was granted custody of her through the Tribal Court. Even were this Court to grant the petition in this case and review the North Dakota Supreme Court's decision, any ruling it would issue could not restore jurisdiction back to the North Dakota courts because there is no legal way for the Tribal Court to be forced by North Dakota courts to restore jurisdiction to them over an Indian child. *See St. Pierre v. United States*, 319 U.S. 41, 43 (1943) (certiorari dismissed because Defendant who was challenging contempt citation had already served his contempt penalty); *North Carolina v. Rice*, 404 U.S. 244 (1971) (challenge to an increased sentence after trial held de novo on appeal did not present active case or controversy because Defendant had served his sentence).

In *People in Interest of M.C.*, 504 N.W.2d 598, 602 (S.D. 1993) the South Dakota Supreme Court noted the problems inherent in deciding an appeal regarding an allegedly improper transfer of jurisdiction to a tribal court after the transfer of jurisdiction has already occurred and found that the Tribe had explicitly agreed to a return of jurisdiction to the State court should the child's appeal succeed. In this case, unlike that case, the Petitioner did not seek a stay from the North Dakota Supreme Court, nor from this Court, and the Tribe has not consented to restoring jurisdiction to the State court should the Petitioner prevail before this Court. A decision by this Court would therefore not resolve an active case or controversy.

CONCLUSION

For the reasons stated above, this Court should deny the petition for a writ of certiorari.

Dated this 23rd day of February 2004.

Respectfully submitted:

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No: 03-784

Supreme Court, U.S.
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In The
Supreme Court of The United States

In the Interest of A.B., A Child.

Norean Hoots, L.S.W., of Cass County Social Services, and Monty Mertz, Guardian ad Litem, on behalf of A.B.,
Petitioners,

v.

K.B., F.B., and Turtle Mountain Band of Chippewa,
Respondents.

On Petition For Writ of Certiorari
To The Supreme Court of The State of North Dakota

PETITIONERS' REPLY TO TRIBE'S BRIEF IN OPPOSITION

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NEW POINTS RAISED IN THE BRIEF IN OPPOSITION

1. Whether Petitioners may raise Tenth Amendment considerations in challenging the application of the Indian Child Welfare Act as unconstitutionally applied to the facts of this case.

2. Whether Petitioners have presented a justiciable issue for the Court's consideration.

3. Discrepancies regarding parties' statements of the case.

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PETITIONER'S ARGUMENT IN REPLY TO NEW POINTS RAISED IN TRIBE'S BRIEF IN OPPOSITION

1. Whether Petitioners may raise Tenth Amendment considerations in challenging the application of the Indian Child Welfare Act as unconstitutionally applied to the facts of this case.

The Tribe asserts that a "States's rights under the Tenth Amendment are not violated when it accepts federal monies in exchange for complying with federal child welfare laws and policies." Tr. Br. in Opp. at 16. Petitioners, as AB's custodian and guardian ad litem respectively, have conscientiously and consistently presented the issues, especially the constitutional arguments, on behalf of the individual child, AB. Certainly AB, as an individual, is not deprived of her individual constitutional rights to procedural due process, substantive due process, or equal protection[1] based on any position a State takes with regard to receipt of federal monies.[2] Further, "[w]here

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[1]"The Tribe acknowledges that A.B. is entitled to due process of law and the equal protection of the law in North Dakota state courts." Tr. Br. in Opp. at 13. However, the Tribe fails to address a key issue in this regard, i.e., the proper level of scrutiny applied. It is Petitioners' position that strict scrutiny applies to the substantive due process and equal protection issues.

[2]The Tribe discusses the State's receipt of federal monies under Titles IV-B and IV-E of the Social Security Act. Tr. Br. in Opp. at 17. The Adoption and Safe Families Act amends the Social Security Act and directs permanency planning for all children in foster care and mandates the application for termination of parental rights of children who have been in foster care too long. 42 U.S.C. § 675(5). The Social Security Act does require a State, in order to be eligible for foster care payments, must have a plan for child welfare services which, inter alia, contains "a description, developed after consultation with tribal organizations ... in the State, of the specific measures taken by the State to comply with the Indian Child

Congress exceeds its authority relative to the States, ... the departure from the constitutional plan cannot be ratified by the 'consent' of state officials ... . State officials ... cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution." New York v. United States, 505 U.S. 144, 182 (1992). "Congress exercises its conferred powers subject to the limitations contained in the Constitution." Id. at 156. The federal government has only limited and enumerated powers; thus, "what is not conferred, is withheld, and belongs to the state authorities." Id.; see also State of Oklahoma v. United States Civil Service Comm'n, 330 U.S. 127, 135-138 (1947) (state may challenge constitutionality of statutory conditions on receipt of federal highway funds). Additionally, Congressional authority under the Indian commerce clause is not without limits. E.g., Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (holding Congress lacks authority under Indian commerce clause to abrogate State's sovereign immunity). Thus, this Court properly may examine the Congressional action at issue here in light of Tenth Amendment, notwithstanding any express or implied consent attributable to state actors.

The Tribe also asserts that Congress has plenary authority to act with regard to Indian Tribes and suggests that Petitioners' analysis is "flawed" and "simplistic." Tr. Br. in Opp. at 19-20 (citing United States v. Mazurie, 419 U.S. 544 (1975) (finding federal authority under Indian commerce clause adequate to clause affords Congress the power to prohibit or regulate the sale of alcoholic beverages to tribal Indians, wherever situated, and to prohibit or regulate the introduction of alcoholic beverages into Indian country); United States v. Kagama, 118

Welfare Act ... ."42 U.S.C. § 622(b)(11). A State, and its agencies, must comply with ICWA; and CCSS does, to the best of its ability, comply with ICWA. The Social Security Act does not require any State administrative agency, or State Court, to ignore a child's independent constitutional rights or require a child to waive her constitutional rights.

U.S. 375 (1886) (discussing Congress' authority to address crime on reservations; noting Congressional abandonment of the treaty-making and move to govern the Tribes by acts of congress); and Morton v. Mancari, 417 U.S. 535 (1974) (examining employment criterion promoting Indian self government and limiting finding to facts of case). See also South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 342 (1998) (Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights). But, a closer look at these and other Indian law cases reveals a context of Congressional action vis a vis tribes as tribes.[3] Notwithstanding the special, paternalistic relationship between the federal government and tribes, it does not follow that Congress has unfettered authority to act vis a vis individuals such as AB, also a North Dakota and United States citizen, under various constitutional provisions, or vis a vis the States, especially when the Congressional act intrudes on authority reserved to the States and the people under the Tenth Amendment.

The Tribe concedes that child protection is an area historically left to exclusive state authority. Tr. Br. in Opp. at 17. It is absolutely appropriate for the Court to address and analyze the Tenth Amendment issue raised by Petitioners.

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[3]Until 1871, Indian tribes were recognized by the United States as akin to nations to the extent that treaties were entered. See Am.Jur. *Indians* § 55 (citations omitted). In 1871, Congress, by statute, declared the Indian tribes subject directly to the power and authority of the laws of the United States by the exercise of its legislative power over them, instead of by treaty. Id. (citations omitted). Since 1871, Indian affairs have been regulated by acts of Congress and by contracts with the Indian tribes. Id. (citations omitted). The United States, "as guardian of Indians, deals only with Indian nations, tribes, or bands, and does not enter into contracts, compacts, or treaties with individual Indians." Id. (citing Sac & Fox Indians v. Sac & Fox Indians, 220 U.S. 481 (1911); Blackfeather v. United States, 190 US 368 (1903)).

2. Whether Petitioners have presented a justiciable issue for the Court's consideration.

Although difficult to discern from the presentation, it appears the Tribe challenges Petitioners' standing and asserts the case is moot. Tr. Br. in Opp. at 14-15, 21-22. It is Petitioners' position that the issues presented are properly presented to the Court and that it is appropriate for the Court to review the same.

a. Standing.

The Tribe asserts that there is no equal protection violation of a child "who allegedly is receiving more rights than a non-Indian child similarly situated ... [and a] state agency does not experience an injury in fact sufficient to confer standing ... when its only 'loss' is the right to attempt to terminate the parental rights over a Indian child." This statement reveals the Tribe's misunderstanding of the law and facts of this case. First, the standard of review under an equal protection analysis based on a suspect classification is the same whether there is benign or invidious discrimination at issue. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227-229 (1995). It makes no sense to assert that since AB is supposedly getting more favorable treatment under ICWA, then no scrutiny or analysis need take place at all. See id. Secondly, to suggest that CCSS only looks to exercise a "right to attempt to terminate parental rights" and thus suffers no injury in fact is offensive.

CCSS is obligated by state and federal law to pursue a termination of parental rights in certain circumstances. N.D.C.C. § 27-20-20.1 (set out in Appendix at 109); Adoption and Safe Families Act, Pub. Law 105-89, Sec. 103 (pertinent part set out in Appendix at 64) (codified at 42 U.S.C. § 675(5)(E)) (both identifying critical time element regarding permanency planning for children in foster care). This obligation flows from the North Dakota Legislature's and

United State's Congress' recognition that a child has an independent right to and interest in health, safety, well-being, and permanency, and that a child need not indefinitely languish in legal limbo for parties, (i.e., their parents, and, in this case, the Tribe), to get their acts together. This is not a case, as Respondent would characterize, about mistreatment of a tribal member or trespass on a Tribe's rights as a quasi-sovereign[4] nation. This is a case about a child who needed someone to immediately take care of her basic needs for food, shelter, clothing, education, and counseling, and her long term need for stability and permanence. At some point, a balancing of the interests between the child, the parents, and the Tribe, must occur, and in this case, CCSS and the guardian ad litem speak for the child. At some point, the parents' dereliction of duty will justify a termination of parental rights. In the Interest of N.H. and B.H., 2001 ND 143, ¶17, 632 N.W.2d 451 (parental "rights are not absolute or unconditional, and parents must provide care that satisfies minimum community standards," and a "child's health and safety are the paramount concern"). At some point, the Tribe's acquiescence and delay will justify the denial of a motion for transfer of jurisdiction. E.g., In re Interest of C.W., 479 N.W.2d 105, 112 (Neb. 1992) (finding good cause to deny transfer where, inter alia, tribe delayed intervention). When the interests to be balanced involve substantive due process issues and/or equal protection issues based on genetically based classification, a strict scrutiny analysis must be applied.

Petitioners recognize the general rule that a litigant may not normally assert the constitutional rights of persons not before the Court. But, AB is before the Court. As previously stated, Petitioners, as AB's custodian and guardian ad litem respectively, have conscientiously and consistently presented

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[4]United States v. Kagama, 118 U.S. 375, 382 (1886) (noting tribes are "neither states nor nations, [and have] only some of the attributes of sovereignty") (emphasis added).

the constitutional arguments on behalf of the individual child, AB. The original action is necessarily brought in her interest. N.D.C.C. § 27-20-08(3) ("The petition ... must be entitled 'In the interest of ___, a child.") (set out in full in the Appendix at 102). The Court should recognize that it is the child's direct standing and personal injury that is truly at issue. Alternatively, the Court may recognize that in some circumstances litigants, (here, CCSS and the guardian ad litem), may assert a third party's, (here, AB's), constitutional rights. E.g., Barrows v. Jackson, 346 U.S. 249 (1953). This is especially so when there is a special relationship between the litigant and the third party and the litigant is an effective proponent of the third party's rights. See Singleton v. Wulff, 428 U.S. 106 (1976); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

The Tribe also asserts that because Petitioners did not seek a stay of the North Dakota Supreme Court decision, AB's right to judicial review by the United States Supreme Court has evaporated. Tr. Br. in Opp. at 21-22. Court's do not require the doing of a vain, useless, or futile thing. E.g., Fargo Public Library v. City of Fargo Urban Renewal, 185 N.W.2d 500 (N.D. 1971) (citing N.D.C.C. § 31-11-05(23) ("The law neither does nor requires idle acts.")) (other citations omitted). Given the clear statements of the North Dakota Supreme Court in this matter regarding the application of ICWA and granting transfer of jurisdiction and dismissal, (albeit Petitioners' position that the holdings are in error), and that court's refusal to reconsider the matter, it would have been pointless to ask the North Dakota Supreme Court for a stay. In the Interest of A.B., 663 N.W.2d 625 (N.D. June 17, 2003) (rehearing denied August 20, 2003). In any event, Petitioners' decision to not request a stay does not deprive the United States Supreme Court jurisdiction in the matter nor prohibit the Court from exercising judicial review.

b. Mootness.

The general rule is that an actual controversy must exist at all stages of appellate review, and not just when the action is initiated. Roe v. Wade, 410 U.S. 113, 125 (1973) (citations

omitted). But where circumstances justify, an issue is not moot if "capable of repetition, yet evading review." Id. (citing Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)) (other citations omitted). Under the Tribes's rationale, AB is not now nor ever entitled to judicial review of whether her constitutional rights have been violated because of the alleged recent/subsequent denomination as a ward of the Tribal Court.[5] Tr. Br. in Opp. at 21-22. The constitutionality of the application of the ICWA to AB by the State's court system is open to challenge. AB is a member of the class of people affected by the presently written statutes and their application is capable of repetition, yet evading review. See Dunn v. Blumstein, 405 U.S. 330, 334 n.2 (1972) (finding appellee had standing to challenge residence requirements regarding right to vote as a member of the class of people affected by the presently written statute, noting the problems to voters posed by the Tennessee residence requirements is "capable of repetition, yet evading review") (citing Moore v. Ogilvie, 394 U.S. 814, 816 (1969); Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)). In this case, just as in Dunn v. Blumstein, "the laws in question remain on the books," and is therefore

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[5]The Tribe also asserts that the Tribal Court had been exercising jurisdiction of AB since 1995 when the grandmother was allegedly granted custody of AB by the Tribal Court. Tr. Br. in Opp. at 22. It is unclear if the Tribe is at this late date suggesting that it held exclusive jurisdiction since the inception of the child's placement with CCSS in March of 2001, when the child was removed from the mother, KB, not the grandmother, HL. Nor does the Tribe here, nor any time previously on the record below, try to explain (1) how a tribal court can enter a custodial order over a non-tribal member, KB, regarding custody of an at least then non-tribal member, AB; or (2) why it did not affirmatively act with regard to the child, in the state proceedings until February of 2002, when it made its first motion to intervene and for transfer of jurisdiction, which the mother vetoed. If in fact the Tribe believed that during the pendency of the proceedings below that the Tribe had exclusive jurisdiction, it never did assert exclusive jurisdiction nor did it properly raise that issue below. The Tribe should be estopped from raising the issue at this time.

capable of repetition, yet evading review. This case is like Dunn in that AB is challenging the constitutionality of the statute at issue.

Further, AB is still a minor child having been born on May 1, 1993. She remains deprived by her parents and is harmed by lack of permanency. See In the Interest of J.P. and D.P., 2004 ND 25, 674 N.W.2d 273 (affirming termination of parental rights of KB with respect to AB's siblings, JP and DP; specifically noting that likelihood of harm was proven beyond a reasonable doubt as required by the ICWA). AB, as a minor child, is entitled to the protection afforded similarly situated children under state and federal child protection laws, and still subject to application of ICWA, and thus entitled to judicial review. See Honig v. Doe, 484 U.S. 305 (1988) (plaintiffs were asserting their rights under the EHA, but not challenging the constitutionality of the legislation itself; Court concluded that twenty year old maintained standing because he was still entitled to benefits under the subject legislation). This case is like Honig in that AB is still a minor and still covered by the ICWA and state and federal child protection laws. Given AB's tumultuous childhood, history of multiple placements, and identified emotional, behavioral, and academic needs, see Pet. for Writ of Cert. at 2, it is not reasonable to suppose that AB's current or future placements will so perfectly suit her emotional, behavioral, and academic needs that further disruption in placement are improbable or return to a state foster care system unlikely. Cf. Honig, 484 U.S. at 320.

The Tribe also suggests that the case is moot because no ruling from the United States Supreme Court could restore jurisdiction back to the North Dakota courts because there is no legal way for the Tribal Court to be forced by North Dakota courts to restore jurisdiction to them over an Indian child. Tr. Br. in Opp. at 1-4, 22. This argument is a circular and again intimates that the Tribe does not concede that AB is entitled to constitutional protections, and that the Tribe does not concede that the United States Supreme Court is the final arbiter of the

constitutionality of statutes. Is the courthouse door open only to tribes who want United States Supreme Court review, but closed in every case where the tribe has prevailed below? The United States Supreme Court has the final say on, as well as the duty to declare, the constitutionality of a statute. Marbury v. Madison, 1 Cranch 137 (1903). The Court may also rule regarding proper application of federal statues, including ICWA. As a dependent-sovereign, the Tribe is not in a position to disrespect a ruling or mandate of the United States Supreme Court. The Tribe in inherently subject to the power of the United States Supreme Court. See United States v. Kagama, 118 U.S. 375 (1886).[6]

3. Discrepancies regarding parties' statements of the case.

Petitioners do take issue with several statements made by the Tribe in its statement of the case. See Tr. Br. in Opp. at 1-4, e.g., regarding timing and form of notification; issues regarding placement and removal from AB's grandmother; etc.[7]

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[6] In United States v. Kagama, 118 U.S. 375 (1886), the Court noted that "soil and the people" within the geographical limits of the United States are under the political control of the government of the United States. With regard to the Tribes, the Court stated that "[t]hey were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty." Id. Further, the "tribes are the wards of the nation. ... dependent on the United States, ... dependent for their political rights." Id. Therefore, "there arises the duty of protection, and with it the power ... [which] has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen. Id. (emphasis added). See also *infra* note 3 (discussing tribal subordinance to federal government).

[7] The Tribe also comments regarding "Tribal Court's agreement to conduct proceedings in Fargo" in response to the forum non conveniens issue raised below. T. Br. in Opp. at 2. This was raised orally by the Tribe's counsel at the evidentiary hearing before the Referee and again at the North Dakota Supreme Court arguments. This alleged agreement was

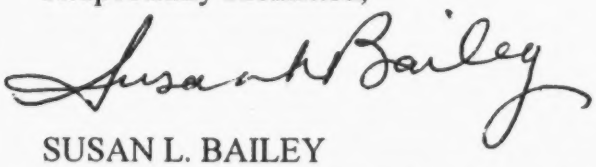
Petitioners here want to acknowledge, and to the extent necessary preserve the issues in dispute, but note that the minor factual discrepancies are secondary to the key and prominent legal issues presented to the Court for review at this preliminary point of consideration.

CONCLUSION

For the reasons set out above, in addition to the reasons set out in the Petition itself, the Petition for Writ of Certiorari to the Supreme Court of the State of North Dakota should be granted.

Dated this 24th day of March, 2004.

Respectfully submitted,



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never documented by Tribal Court order, memorandum, or letter. Such hearing in the Fargo area in fact never happened, notwithstanding the North Dakota Supreme Court's apparent reliance in part on the representation.